

FINAL RULE
SUPPLEMENTAL NUTRITION ASSISTANCE PROGRAM:
DISQUALIFIED RECIPIENT REPORTING AND COMPUTER MATCHING
REQUIREMENTS

Note: Food, Nutrition, and Consumer Services Under Secretary Kevin Concannon signed the following document on July 10, 2012, and the agency has submitted it for publication in the *Federal Register* (FR).

While we have taken steps to ensure the accuracy of this version of the document, it is not the official version. Please refer to the official version in a forthcoming FR publication, which will appear at www.federalregister.gov and on www.regulations.gov.

Once the official version of this document is published in the FR, this version will be removed from the web and replaced with a link to the official version.

DEPARTMENT OF AGRICULTURE

Food and Nutrition Service

7 CFR Parts 272 and 273

RIN 0584-AB51

**Supplemental Nutrition Assistance Program: Disqualified Recipient Reporting and
Computer Matching Requirements**

AGENCY: Food and Nutrition Service, USDA.

ACTION: Final rule.

SUMMARY: This final rule codifies the provisions of a proposed rule published on December 8, 2006, regarding prisoner verification and death matching procedures mandated by legislation and previously implemented through agency directive. This rule also requires State agencies to use electronic disqualified recipient data to screen all program applicants prior to certification to assure they are not currently disqualified from program participation. Finally, this final rule implements procedures concerning State agencies participation in a computer matching program using a system of records required by the Computer Matching and Privacy Protection Act of 1988, as amended.

DATES: (Insert date that is 60 days after publication in the FEDERAL REGISTER).

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SUPPLEMENTAL INFORMATION:

BACKGROUND

On December 8, 2006, the Food and Nutrition Service (FNS) published a proposed rule in 71 FR 71075 to revise the SNAP regulations in 7 CFR Parts 272 and 273 regarding computer matching requirements, the prisoner verification system (PVS), the deceased person matching system and electronic disqualified recipient system (eDRS) matching, as well as redefining data requirements and retention, and the process for application screening. Comments on these proposed revisions were solicited until February 6, 2007. A total of 26 sets of comments were received by the published deadline from 22 State SNAP agencies, 2 governmental associations, and 2 recipient interest groups. This final rule addresses the concerns expressed in these comments. Readers are referred to the proposed rule for a more complete description of the rule's requirements and stipulations. The following is a discussion of the provisions of the proposed rule, the comments received, and the changes made in the final rule.

General Comments

Of the 26 sets of comments received, most recommended that FNS withdraw the proposed regulation altogether. Of these, 15 comments offered alternative suggestions for FNS to consider. FNS categorized the comments in order to sum up their contents: Burdensome and Ineffective (20 comments); Impact on Application Timeliness (15 comments); Impact on Simplified Reporting (12 comments); Impact on State Computer Systems (9 comments); Inaccurate Cost-Benefit Analysis (3 comments); and Cases Where Matches Cannot Be Verified (3 comments). All comments are addressed under the specific regulation citation they reference.

Some comments received were general and did not pertain to specific regulation citations. Those comments are addressed first and are related to simplified reporting and computer systems.

Simplified reporting was authorized by the Farm Security and Rural Investment Act of 2002 (the 2002 Farm Bill), subsequent to the implementation of prisoner and death matching requirements. Since 2002, 51 State agencies have opted to implement simplified reporting. Generally, under simplified reporting, households are required to report changes in income between certification and scheduled reporting periods only when the total countable income rises above 130 percent of the poverty level. Prior to simplified reporting, most households were required to report most changes within 10 days, or monthly. State agencies implementing simplified reporting can set reporting intervals or certification periods at 4, 5, or 6 months. Generally, for households subject to simplified reporting, the death or imprisonment of a household member does not have to be reported until the 6-month report, or at the next recertification period for prisoner verification. Those electing 12-month certification spans must require an update of household circumstances at the 6-month interval, unless the household is made up of elderly or disabled members.

In some circumstances, no overpayment can occur if the change was not required to be reported. Simplified reporting has provided multiple benefits for State administration and Program access. FNS concurs with the comments expressing that simplified reporting has been beneficial in making the Program more efficient and recipient-friendly and will make specific accommodations for simplified reporting options when warranted in the waiver process.

In regard to the need to change computer systems, nine State agencies commented that the overall provisions in the proposed rule will require them to make expensive changes. There were three comments concerned with the steps States may need to take if the matches required by

these provisions cannot be verified. In this instance, no adverse action is to be taken against the households for any matches described in this rule that cannot be verified.

In general, the comments expressed recognition that these matches are required by law, and suggested alternatives that would allow State agencies the discretion to determine the frequency of the matches. While FNS carefully considered these comments, the matches are required by law and FNS considers the frequency of the matching requirements described herein to be an acceptable standard.

Prisoner Verification System (PVS)

Section 1003 of the Balanced Budget Act of 1997 (Public Law 105-33) amended Section 11(e) of the Food Stamp Act of 1977¹ (7 U.S.C. 2020(e)) to require States to establish systems and take periodic action to ensure that an individual who is detained in a Federal, State, or local penal, correctional, or other detention facility for more than 30 days shall not be eligible to be counted as a household member participating in SNAP. The FNS final rule will codify this requirement and define taking periodic action as requiring States to conduct PVS checks at application and re-certification.

FNS received several comments specifically addressing this provision. Thirteen comments stated that PVS data received from the Social Security Administration (SSA) is not reliable, shows only that individuals have been incarcerated in the past, and does not provide the admission and tentative release dates. One comment stated that State agencies cannot require correctional facilities to provide the necessary verification for taking action. Further, six

¹ The Food Conservation and Energy Act of 2008 (FCEA) renamed the Food Stamp Act of 1977 to the Food and Nutrition Act of 2008.

comments indicated that including children and one person households in the PVS matches provide little value.

FNS carefully considered these comments in finalizing this provision and agrees that it is appropriate to exempt minor children, as that status is defined by each State, and one-person households where there is a face-to-face interview. Therefore, these exemptions are provided for in the revised §272.13. However, with regard to the frequency of the match, taking into account both simplified reporting and the need to prevent those incarcerated for more than 30 days from participating, FNS determined that conducting the prisoner match at application and recertification provides the best opportunity for effective policy enforcement. Therefore, FNS retained in this final rule the requirement to perform a PVS match with household members at application and recertification. Going forward, FNS will make every effort to work with the SSA and other relevant agencies to improve the quality and timeliness of the data made available to State agencies for the purpose of conducting the prisoner match. FNS is also willing to consider any alternatives that State agencies may wish to propose for their own unique situation through its waiver process.

Deceased Matching System

This rule also implements the deceased matching requirements enacted by Public Law 105-379 on November 12, 1998. Public Law 105-379, which amended Section 11 of the Food Stamp Act of 1977 (7 U.S.C 2020), required all State agencies to enter into a cooperative arrangement with the SSA to obtain information on individuals who are deceased, and use the information to verify and otherwise ensure that benefits are not issued to such individuals. The law went into effect on June 1, 2000. The mandated requirements were implemented by FNS

directive to all SNAP State agencies on February 14, 2000. State agencies are responsible for entering into a matching agreement with SSA in order to access information on deceased individuals. FNS proposed adding a new §272.14 to codify this requirement in regulation and included requirements for accessing the SSA death master file. These requirements included independently verifying the record prior to taking adverse action, and conducting matches for deceased individuals at application and re-certification.

Several comments specifically addressed this provision. Eleven comments stated that experience has shown that it is very unusual for households to initially apply for benefits for a deceased household member. They state that, since starting to conduct death matches in 1999, it is more common that the death of a household member during the certification period goes unreported by the remaining household members. With simplified periodic reporting, the change does not need to be reported until the interim report of the next recertification.

Four comments received noted that the preamble to the proposed rule states that the SSA death master file be matched at the time of application and at recertification, but the actual wording in the regulation language says "...at the time of application and periodically thereafter." FNS concurs that this is inconsistent and confusing; "periodically thereafter" may not be the same as recertification. FNS has, therefore, amended this provision in the final rule as indicated below.

Two comments noted that fulfilling the volume of match requests at the frequency required by the proposed regulation would be burdensome for SSA. One commenter further noted that, in the past, FNS has instructed State agencies to reduce the frequency of matches because the previous frequency was burdensome for SSA. SSA did encounter certain burdens during the implementation phase of the prisoner and death matches, but has subsequently worked through

those complications. Nevertheless, FNS does want to focus on implementing requirements that will improve Program integrity while not imposing unnecessary burdens on State agencies.

Accordingly, after considering the comments, FNS is amending the final rule with respect to death matches. The revised final provision at §272.14(c)(1) provides the requirement that State agencies conduct the match of deceased individuals against household members at application and no less frequently than every 12 months. As a result, FNS believes this final rule maintains the intent of the statute for conducting this match while relieving States of requirements that do not effectively promote Program integrity. In addition, State agencies can design their matching systems to make them more consistent with their simplified reporting procedures.

Disqualified Recipient Reporting

Existing regulations at §273.16(i)(4) require State agencies to use disqualified recipient data to ascertain the correct penalty, based on prior disqualifications, for an individual currently suspected of an intentional Program violation (IPV), and to determine the eligibility of Program applicants suspected of being in a disqualified status. The proposed rule further proposed:

- State agencies use disqualified recipient data to screen all Program recipients and applicants prior to certification. State agencies may also periodically match the entire database of disqualified individuals against its current caseload.
- State agencies not take an adverse action against a household based on information provided by a disqualified recipient match unless the match information has been independently verified.
- The State agency initiating the disqualified recipient search contact the State agency that originated the disqualification or the household for verification prior to taking adverse action

against the household. The proposed rule proposed that the agency that originated the disqualification provide documentation to the requesting agency within 20 days of the postmarked date of request.

- The disqualified individual and, if applicable, the household, be informed of the effect of the existing disqualification on the eligibility and, if applicable, benefits of the remaining household members.

- Changes and updates to the format, methodology and fields State agencies use to report and access intentional Program violation (IPV) disqualification information.

Several comments specific to disqualified recipient matching were received. Regarding implementation, 13 comments noted that the provisions of the rule would be very difficult to implement because the nationwide eDRS database provided by FNS to perform this function is problematic. The comments further state that very few of the disqualifications in eDRS are relevant to the day-to-day operation of the Program because eDRS maintains disqualifications indefinitely, including those for individuals who are deceased or incarcerated for long periods of time. As the records age, the disqualifications become less and less useful because they have no impact on current eligibility. One comment noted that a very small percentage of SNAP households had the potential to be affected by an actively disqualified household member. Also, twelve comments noted that in order to meet the requirements of the rule, all eligibility workers would need access to eDRS via the eAuthentication process required by the Department of Agriculture, expressing concern that putting all eligibility workers through this process would be cumbersome and impractical.

Regarding the need for the eDRS system, while one State agency commented that it queries eDRS for those who newly arrive to the State, five other State agencies noted that disqualified

recipients who newly arrive in the State are already known to the incoming State agency. State and local eligibility workers regularly contact other State agencies when applicants newly arrive from other States to obtain information about the applicant's participation, disqualification and able-bodied adults without dependents (ABAWD) status. These State agencies asserted that there is no need to check current or former household members (when they apply) from within the State as those participants and their disqualification status are already known. Further, they believed there was no reason to re-screen applicants at recertification since the current State would have originated any disqualification action and would have already known about it.

Regarding secondary verification, 11 comments noted that the timeframe of 20 days, specified under the computer matching requirements, for another State agency to respond for a request for information, does not leave enough time to gather all of the information and process the application in a timely manner. The comments indicated that if the person should not have been certified, it will be discovered when the State processes a periodic match and an overpayment can be completed at that time. They also indicated that it is unclear what a requesting State should do in instances of expedited service cases or if the other State agency does not respond within 20 days. Finally, one comment supported the proposed rule's clarification that no adverse action be taken against a recipient or applicant based on a match unless the match information is independently verified.

Regarding the eAuthentication process, FNS recognizes that this process may be difficult for some States to obtain the proper eAuthentication levels for their eligibility workers. The eAuthentication process is vital to protecting personally identifiable information of SNAP recipients, confidentiality and the integrity of the Program. This process, while difficult, is necessary to maintain the security standards set forth to protect client information. FNS will

continue to explore possible ways to make the eAuthentication process less burdensome for States in the future.

In addressing these comments, it is important to note that, as a Program with national eligibility standards, an individual disqualified in one State because of an IPV determination is also disqualified in every State. However, the Program is administered by State agencies that use and maintain their own systems and databases to perform the functions associated with certifying and supplying benefits to households. As such, there must be some mechanism in place so that a State agency can determine that an applicant has been disqualified by another State when they apply for SNAP benefits. Also, since the disqualification penalties are cumulative, the State agency must be aware of whether an individual has had any prior disqualifications by any other State in order to assign the appropriate disqualification penalty.

The issue of how States become aware of an existing or previous disqualification to ensure that ineligible individuals are not participating or the proper disqualification is assigned is the crux of this portion of this rule. In the performance of this function, an individual's rights must be protected to ensure that only those individuals that should be ineligible to receive benefits due to an existing or previous disqualification are indeed determined ineligible. Further, States are expected to provide this information in a timely manner to the requesting State so that they can determine the eligibility of the applicant. States that fail to provide the requested information within the time frame set forth under the computer matching requirements are considered to be out of compliance with these regulations. Those States will be subject to corrective action upon review. In any case where the requesting State has not received the information timely, the State should certify the household for benefits in accordance with our regulations until it receives the requested documentation. If the State subsequently receives verification that the client or

household is ineligible, they should disqualify them and establish a claim to collect any benefits that were issued in error. While FNS carefully considered all comments in determining the final provisions in this rule, the Agency wanted to ensure that individuals' rights are protected and that proper disqualifications are assigned. FNS believes this final rule meets these goals while adequately addressing the concerns of the comments.

Many of the comments received regarding this provision focus on the operation and integrity of the data contained in eDRS. There were concerns that the data may be outdated, inaccurate or incomplete. While FNS is continuously trying to add appropriate edits and perform data integrity checks where possible, it is ultimately the responsibility of each State to enter timely, accurate and verifiable disqualification data into eDRS for use by other States. This is a nationwide partnership in which FNS and State agencies need to work together to ensure that ineligible individuals are not participating and that disqualified individuals receive the appropriate disqualification period. FNS is committed to continuing efforts to improve the system and the integrity of data to ensure accurate and timely disqualifications are imposed.

FNS does not agree with the comment that very few of the disqualifications in eDRS are relevant to the day-to-day operation of the Program. Records with disqualification periods that have expired are necessary for making penalty determinations and those that remain active are useful for determining eligibility. Further, in addition to the complete database file containing all the records in the system, FNS has for some time made available a file containing only active records, specifically designed for the purpose of conducting eligibility matches. FNS has also modified its online database access system to search only active records when the user selects "Eligibility" as the purpose for the inquiry.

Nevertheless, FNS agrees with the comment that a very small percentage of SNAP households would be affected by a disqualified member. Data reported by States indicated that, in fiscal year 2010, 36,859 individuals were disqualified out of a total of 40.3 million participants. In addition to these 37,000 disqualifications, there are also those still serving 2-year, 10-year or permanent disqualifications whose records remain active. While this number remains relatively low compared to the number of participants, it still represents a potential issuance risk in excess of nearly \$2.0 million per month should these individuals not be prevented from participating, based on estimates for 2013. The potential also exists for any of these individuals to cross into another jurisdiction to avoid serving their penalty. FNS believes that some form of applicant screening is therefore necessary to prevent those inclined to try to participate during a period of disqualification and to deter those that might otherwise make the attempt.

In response to those comments suggesting that there was no need to check current or former recipients (when they apply) from within the State, or to re-screen applicants at recertification since the State would have originated the action and would have already known about it, FNS would point out that since applicant matching was not previously mandated one cannot be certain there are no disqualifications in an individual's past. For example, applicants that may have been in a disqualified status in one State may have moved to, and been determined eligible by, another State that did not conduct the match at the time of application. Therefore, it is possible that disqualified individuals are currently participating in a number of States. However, FNS does agree that there is probably no need to conduct matches at recertification once FNS is reasonably certain that currently disqualified individuals that may be receiving benefits are removed from the active rolls. Consequently, FNS will retain the requirement to match all applicants prior to initial certification but require matches at recertification only for the first year

subsequent to implementation of this final rule. Within the first year of the implementation date of this rule, but no later than 180 days from publication, States will be required to match all applicants prior to initial certification, all newly added household members at the time they are added, and all participants in the household at recertification. In the second year, the requirement to match participants at recertification will be discontinued, and States will only be required to match applicants prior to initial certification and newly added household members as they are added. Further, since the purpose of a 1-year match at recertification is to remove currently participating disqualified individuals, States having the ability to conduct a one-time match of their entire active caseload against active cases from the disqualified recipient database may do so and be exempted from the requirement to conduct matches at recertification. The periodic match that would have been required by the proposed rule will not be required in this final rule, but may be conducted at the option of the State. Finally, States may exempt from the matching requirements those individuals that have not reached the age of majority as defined by State statute.

Computer Match Benefit Adjustments

FNS proposed to add language to the existing regulations for when mass changes are made in Federal benefits that affect SNAP allotments. Specifically, in cases when the change in allotment was the result of a computer match, FNS proposed that the information would need to be independently verified, and the SNAP household would need to be provided notice and an opportunity to contest any adverse action, if the adjustment would change the level of benefits or eligibility status of the household.

FNS received several comments specific to this provision. One comment stated that this alternative is not attractive as it constitutes much more effort than applying the existing procedure. In addition, two commenters were concerned about the additional burden placed upon State agencies if this information is not considered verified upon receipt.

FNS carefully considered the comments in this area. A computer match, covered by the Computer Matching Act [5 U.S.C. 552a(o)], uses information provided by a Federal source and compares it to a State record, using a computer to perform the comparison; this match affects eligibility or the amount of benefits for a Federal benefit program. As such, FNS has no discretion in this area and the information must be independently verified. Moreover, the SNAP household must be provided notice and given an opportunity to contest the adverse action if the adjustment would change the level of benefits or eligibility status of the household. However, State agencies should be aware that the independent verification/notice of adverse action provisions apply only if there is an adverse effect on benefits (i.e., a denial, termination or reduction in benefits). The vast majority of mass changes in benefits are increases due to cost-of-living adjustments. As such, FNS expects this new requirement to have a minimal impact on State agency workload. In addition, State agencies can use the option found at §273.12(e)(3)(A) to implement mass changes using percentages. Therefore, this provision remains unchanged in the final rule (see §273.12(e)(3)(B)).

Implementation

State agencies have been instructed through FNS directive to implement the provisions of the prisoner verification matches (Public Law 105-33) and death file matches (Public Law 105-379) as required by law in the applicable legislation, and these matches should already be in place

without waiting for formal regulations. Unless specified below, the remaining provisions of this rule are effective and must be implemented the first day of the month following 60 days from date of publication of this final rule.

Since the inception of the disqualified recipient database in 1992, FNS has required that States query the database for the purpose of assigning the correct penalty to those being disqualified and whenever they believe an applicant may be in a disqualified status. To comply with these requirements, States should already have in place some capability for conducting matches against the disqualified recipient database. In recognition of this, the provisions of this rule dealing with the systematic matching of disqualification data in §273.16(i) are effective and must be implemented no later than 180 days after the effective date of this final rule.

Procedural Matters

Executive Order 12866 and Executive Order 13563

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility.

This final rule has been designated a “significant regulatory action,” although not economically significant, under section 3(f) of Executive Order 12866. Accordingly, the rule has been reviewed by the Office of Management and Budget.

Regulatory Impact Analysis

As required for all rules that have been designated as significant by the Office of Management and Budget, the following Regulatory Impact Analysis (RIA) was developed for this final rule.

Regulatory Impact Analysis

1. Title: Supplemental Nutrition Assistance Program: Electronic Disqualified Recipient System Reporting and Computer Matching Requirements that Affect the Supplemental Nutrition Assistance Program
2. Action:
 - a. Nature: Final Rule
 - b. Need for the Rule: This final rule codifies prisoner verification and death master file matching procedures mandated by legislation and previously implemented through agency directive. This rule also revises SNAP regulations affecting the way State agencies access and use client disqualification information to enforce penalties for Intentional Program Violations (IPV).
 - c. Background: The Balanced Budget Act of 1997 (Pub. L. 105-33), enacted on August 5, 1997, requires States to establish systems and take periodic action to ensure that an individual who is detained in a Federal, State, or local penal, correctional, or other detention facility for more than 30 days shall not be eligible to participate in the Supplemental Nutrition Assistance Program. The law was effective August 5, 1998. This regulation will amend current rules to require States to conduct Prisoner Verification System (PVS) checks at application and re-certification. Public Law 105-379, enacted on November 12, 1998, requires all State agencies to

enter into a cooperative arrangement with the Social Security Administration (SSA) to obtain information on deceased individuals and to use the information to verify and otherwise ensure that benefits are not issued to such individuals. The law was effective June 1, 2000. FNS is also requiring States to use the Electronic Disqualified Recipient System (eDRS) to screen all new applicants. States report all disqualified recipients to the eDRS database in order to prevent those individuals from participating in other States and to ensure that the proper penalties are assigned for intentional Program violations.

3. Justification of Alternatives. The Department has no discretion regarding the portions of the regulation that are based on legislative mandate to implement prisoner verification and deceased persons' data match programs. The Department does have discretion on the portion of the regulation affecting matches to identify disqualified recipients. The law requires that matches be performed, but is silent on when in the certification process the match must occur. The regulation mandates that these matches be performed up front, prior to certification. This alternative was chosen over requiring matches at a later point in the certification process because of the expected result that earlier mandatory verification will save the most taxpayer dollars.

4. Effects:

Effects on Low-Income Families. This action would identify deceased individuals, prisoners, and other ineligibles to ensure that they are not included as members of SNAP households. These matches will assist State agencies in identifying who, due to extended certification periods or failure to notify a change of household status, should no longer receive SNAP benefits. The number of people we estimate being removed from the SNAP caseloads as a result of the matches is described in detail below.

PVS Matches: FNS estimates that mandatory computer matches using the PVS will identify approximately 64,000 ineligible prisoners from the SNAP case rolls in 2013. Because this regulation is codifying legislation enacted some years ago, all States are currently performing data matches using the PVS for initial certifications and recertification, so the impacts on participation and costs for initial certifications are incorporated in current baseline budget estimates. There are no new savings.

The estimate on the impact of the computer match using the PVS is based on a General Accounting Office² (GAO) Study, Substantial Overpayments Result from Prisoners Being Counted as Household Members, issued in March 1997. GAO examined data from four States: California, Florida, New York, and Texas. GAO estimated that in 1995, \$2.6 million in benefits were paid to 9,440 State prisoners, and \$925,000 in benefits was paid to 2,698 county prisoners, with a total of 12,138 prisoners receiving \$3.5 million for an average of 3.85 months. If we assume that prisoners would have continued to receive benefits for one month before the data match identified them and they were removed from the caseload rolls, we estimate that a mandatory computer match with State and County prisoner databases at the time of certification could have saved \$2.6 million in overpayments in those four States. The one month that the prisoners would continue to receive benefits reduces the savings from the match from \$3.5 million to \$2.6 million. The 12,138 prisoners accounted for 0.13 percent of the 1995 SNAP caseload among those four States.

Between 1989 and 2009, the average number of initial certifications was nearly identical to the number of households participating in an average month, and the average number of recertifications was close. In any given year, the two numbers tracked closely together – when caseloads rose, so did the number of initial certifications and recertifications. Since we project

² The General Accounting Office is now known as the Government Accountability Office.

caseloads and not initial certifications and recertifications, we use projected participation estimates as a proxy for the number of certifications and recertifications.

The effect on participation resulting from a mandatory computer match is taken by applying the 0.13 percent impact to the total projected FY 2013 caseload of 46.9 million. This yields an estimate of 61,000 ineligible prisoners who would be taken off the SNAP rolls at initial certification. However, prior to the enactment of the legislation mandating matches, a number of States were already performing these matches – Connecticut, Massachusetts, New York, Maryland, Pennsylvania, Florida, Mississippi, North Carolina, Tennessee, Illinois, Texas, Kansas, and Missouri – accounting for 45 percent of the FY 2011 caseload. We also adjusted to account for an increase in the number of prisons between 1995 and 2017 (actual numbers through 2010 and projected for 2017) and an expected false positive match rate of 10 percent. Making the match mandatory for the States who did not perform the match prior to the legislation will remove 44,000 prisoners in 2013.

Requiring biennial matches at the time of recertification would yield yet more ineligible prisoners. No States were performing matches at recertification when the law was enacted, but now all States are, so all of the savings are incorporated in the budget baseline and none are “new.” There would be no savings from those prisoners who were identified in previous matches. According to the most recent SNAP characteristics report, the average certification period for SNAP households is 12 months. However, the number of new prisoners who entered the system in 2010 is about half the total prison population as of June 30, 2011. Therefore, matches at recertification would yield only half as many hits as matches performed at initial certification. Therefore, we halved the original impact of 61,000. We also adjusted for an increase in the number of prisoners from 1995 to 2013 and assumed a 10 percent false positive

match rate. Finally, we halved the impact yet again to adjust for biennial matches. The estimate of prisoners identified at recertification matches in 2013 is 20,000.

To obtain the impact of performing the matches at initial certification and at recertification, we added the two totals together, getting 64,000 prisoners for 2013. The estimate assumes that these prisoners identified by the matches would then be removed from the SNAP caseloads.

To obtain the impact of performing the matches at initial certification and at recertification, we added the two totals together, getting 60,000 prisoners for 2012. The estimate assumes that these prisoners identified by the matches would then be removed from the SNAP caseloads.

Matches with Social Security Deceased Lists. Mandatory computer matches using Social Security Administration (SSA) lists of deceased individuals could identify an estimated 100,000 deceased individuals on SNAP case rolls in 2013. Because this regulation is codifying legislation enacted some years ago, all States are currently performing data matches using the SSA lists at initial certification and at recertification, so the impacts of matches at initial certification on participation and costs are incorporated in current baseline budget estimates. There are no new savings that are not incorporated in the current budget baseline estimates.

In 2013, we estimate that 39,000 deceased individuals will be identified from matches performed at initial certification, and 61,000 individuals will be identified through matches performed at recertification.

The estimate on the impact of the computer match using SSA lists of deceased individuals is based on a GAO Study, Thousands of Deceased Individuals Are Being Counted as Household Members, issued in February 1998. GAO examined data from four States: California, Florida, New York, and Texas, and estimated that in 1995 and 1996, \$8.4 million in benefits were paid on behalf of 25,881 deceased individuals, with these individuals “receiving” benefits for an

average of 4.17 months. If we assume that some deceased individuals would have continued to be issued benefits for one month before the data match identified them and they were removed from the caseload rolls, we estimate that a mandatory computer match with SSA databases could have saved \$3.2 million per year in overpayments. This figure is derived from taking the \$8.4 million they received in benefits over two years, assuming that they would still receive benefits for 1 month rather than an average of 4.17 months, and halving the figure to get an annual total. The 12,941 deceased individuals (half of the 25,881 individuals identified over a two-year period) accounted for 0.14 percent of the 1996 SNAP caseload in those four states.

Between 1989 and 2010, the average number of initial certifications was nearly identical to the number of households participating in an average month, and the average number of recertifications was close. In any given year, the two numbers tracked closely together – when caseloads rose, so did the number of initial certifications and recertifications. Since we project caseloads and not initial certifications and recertifications, we use projected participation estimates as a proxy for the number of certifications and recertifications.

The effect on participation resulting from a mandatory computer match on deceased individuals at the time of initial certification is taken by applying the 0.144 percent impact to the total projected FY 2013 caseload of 46.9 million. This yields an estimate of nearly 68,000 deceased individuals who would be taken off the SNAP rolls. Several adjustments were made after this point. First, prior to the enactment of the legislation mandating matches, a number of States were already performing these matches – California, New York, Florida, Illinois, and Ohio – accounting for 35 percent of the FY 2011 caseload. We assume that 10 percent of the matches are false positives. We estimate that mandatory matches at certification will identify an estimated 39,000 deceased individuals being removed from the rolls in 2013.

Requiring the matches at the time of recertification would identify more deceased persons. Since no States were performing matches at recertification at the time that the law was enacted, all States would be included. We also assume that 10 percent of the matches are false positives. Thus, we estimate that performing the match at recertification would identify 61,000 deceased individuals in 2013 for removal from SNAP caseloads.

To obtain the impact of performing the matches at initial certification and at recertification, we added the two totals together, for a total of 100,000 deceased persons identified through matches in 2013.

Matches Using the eDRS. Optional matches at initial certification using the eDRS as currently being performed will remove more than 6,000 ineligible persons from caseloads at initial certification in 2013. Making matches mandatory at initial certification and conducting a one-time match at recertification for current participants will remove an additional 9,000 ineligible persons from the caseloads in 2013; nearly 3,000 identified at initial certification and more than 6,000 identified at recertification.

The estimate on the impact of the computer match using the eDRS is based on a GAO Study, Households Collect Benefits for Persons Disqualified for Intentional Program Violations, issued in July 1999. GAO examined data from four States: California, Illinois, Louisiana, and Texas, and estimated that in 1997, \$528,000 in benefits were paid to households on behalf of 3,166 disqualified individuals, with these individuals receiving benefits for an average of 2.33 months. If we assume that some disqualified individuals will continue to be issued benefits for one month, we estimate that a mandatory computer match at initial certification with the eDRS could have saved \$301,000 in overpayments.

The four States accounted for 28 percent of the caseload in 1997 and 29 percent of benefits issued. Thus, taking the demonstration figures and applying them nationally, we estimate that over 11,000 individuals would have been disqualified.

We know from the eDRS that as of December 2010, 49,500 individuals were currently disqualified from SNAP. We do not have figures for past years, so we have no definitive data for whether the number of individuals disqualified at any one time has risen or fallen over the past decade. However, in the FNS National Data Bank, we have the number of disqualifications by year and by length of disqualification. Using this data to estimate the number of individuals becoming disqualified and the number of individuals whose disqualification expires, we estimate that over the past decade, the number of disqualified individuals has fluctuated between 50,000 and 70,000, and are not correlated with SNAP participation levels. So we did not make any adjustments to account for changes in overall participation levels.

Under current regulations, States are not required to perform the eDRS matches routinely; they are required only to do periodic matches on an ad hoc basis. FNS staff members estimate that 27 States, with 64 percent of the SNAP caseload, are currently doing routine matches at initial certification. No States are doing matches at recertification. Assuming that the regulations are published by September 2012, and adjusting for a 10 percent false positive rate for matches, we assume that in 2013, 9,000 ineligible persons will be identified by matches performed at initial certification. Of these, we estimate that 6,400 are currently identified and after publication of this regulation, an additional 2,800 will be identified. We are assuming that half the States not doing the match will have implemented the match by January 1, 2013, and the remaining States will have implemented the matches by July 1, 2013, for an overall phase-in rate of 75 percent for 2013 and 100 percent in later years.

The number of ineligible persons identified at recertification is adjusted downwards to account for the fact only new disqualifications would be identified. Also, we are assuming that we are only performing the recertification matches once, rather than annually or biannually. To estimate the impact of running one-time matches at certification, we computed the percentage of disqualifications which are for under a year (91 percent), and adjusted the estimate by that factor. We estimate that over 9,000 ineligible individuals will be identified through matches performed at recertification. We are assuming that in 2013, half the remaining States will have implemented the one-time matches at recertification by January 1, 2013, and the remaining half by July 1, 2013; so we are assuming a 75 percent impact for 2013 and a 25 percent impact for 2014. Thus, we are assuming the newly-matching States will identify nearly 7,000 ineligible individuals in 2013, and the remaining 2,000 individuals identified in FY 2014.

To obtain the impact of performing the matches at initial certification and at recertification, we added the totals for initial certification and recertification together for a total of 6,000 disqualified individuals identified by States currently performing matches and 10,000 disqualified individuals identified by States newly implementing matches in 2013.

Effects on Administering State Agencies: This rule affects State agencies by codifying computer matches mandated by legislation and requiring a previously optional computer match.

Effect on Retailers. This action is not anticipated to have any measurable impact on SNAP retailers.

Cost Impact. This action reduces benefit costs by identifying and removing ineligible and deceased individuals from the SNAP. It does not affect benefit levels for households without individuals identified in the computer matches.

PVS Matches: FNS estimates that mandatory computer matches using the PVS will save approximately \$26 million in benefits that would have been paid to households on behalf of ineligible prisoners in Fiscal Year 2013. Of that, nearly \$18 million will be saved through matches performed at initial certification, which were made mandatory by legislation and are incorporated in current budgetary baselines. Nearly \$8 million will be saved through matches performed at recertification, which will be required under discretionary provisions of this regulation. The savings is estimated at \$115 million for the five-year period 2013-2017.

The cost estimate was derived using the same methodology as that used for the participation impact estimate. Using data from the GAO report, we estimate that about \$2,618,847 in overpayments could have been avoided using the computer match at initial certification. This accounted for 0.03 percent of benefits issued in Fiscal Year 1995.

Applying this to the Fiscal Year 2013 estimated benefits of \$75.2 billion yields an unadjusted savings of \$24 million in reduced overpayments to prisoners at initial certification. After taking out those States who used the PVS prior to the legislation making such matches mandatory, adjusting for increases in the number of prisoners since 1995, and assuming a 10 percent false positive rate for matches, we estimate that the savings will be \$18 million.

Requiring the matches at the time of recertification would yield additional savings. Since all States are performing matches at recertification, any cost savings are included in the current budget baseline. There would be no savings from those prisoners who were identified in previous matches. According to the most recent SNAP characteristics report, the average certification period for SNAP households is 12 months. However, the number of new prisoners who entered the system in 2010 is about half the total prison population as of June 30, 2011. Therefore, matches at recertification would yield only half as many hits as matches performed at

initial certification. Therefore, we halved the original savings of \$24 million. We also adjusted for increases in the number of prisoners and assume a 10 percent false positive rate for matches. Finally, we halved the estimate because the recertification matches will be performed biennially, rather than annually. The savings from performing matches at recertification is an estimated \$8 million in Fiscal Year 2013.

To obtain the impact of performing the matches at initial certification and at recertification, we added the two totals together, for savings of \$26 million. The five-year savings are an estimated \$115 million.

Matches using Social Security Deceased Lists. The mandatory computer matches using SSA lists of deceased individuals may save over \$45 million in benefits that would have been issued to households on behalf of deceased individuals in FY 2013. Of that, \$18 million will be saved through matches performed at initial certification, which were made mandatory by legislation and are incorporated in current budgetary baselines. Nearly \$27 million will be saved through matches performed at recertification, which will be required under discretionary provisions of this regulation. The total savings over the five-year period is estimated to be \$203 million.

The cost estimate was derived using the same methodology as that used for the participation impact estimate. Using data from the GAO report, we estimate that about \$3,185,000 in overpayments could have been avoided using the computer match. This accounted for 0.04 percent of benefits issued in Fiscal Year 1996.

Applying this to Fiscal Year 2013 estimated benefits of \$75.2 billion yields an unadjusted savings of \$30 million in reduced overpayments to deceased individuals. After taking out those States who ran computer matches with SSA death lists prior to the legislation making such

matches mandatory, and assuming a 10 percent false positive rate for matches, the cost savings for performing matches at initial certification is \$18 million.

Since all States currently perform matches with SSA death lists at recertification, these costs are all incorporated in the current budget baselines. The average certification period is 12 months; we take an annual estimate as for initial certification. The cost savings for performing matches at recertification is estimated at nearly \$27 million in 2013 and \$121 million for 2013-2017.

We then combined the savings for matches at initial certification and at recertification for a total of \$45 million. The five-year savings are an estimated \$203 million.

Matches using the eDRS. Matches at initial certification and recertification using the eDRS may save nearly \$3 million in benefits that would have been paid out to individuals disqualified from participating in SNAP in Fiscal Year 2013 and \$8 million for 2013-2017. Of that, more than \$1 million of these savings is incorporated in the budgetary baseline for FY 2013; the five-year estimate is nearly \$6 million. Under current law, States are only required to do periodic matches; however, 27 States currently perform matches at initial certification. No States perform matches at recertification. New savings are estimated to be nearly \$2 million for Fiscal Year 2013. The five-year savings for 2013-2017 is estimated at \$2.2 million.

The cost estimate was derived using the same methodology used for the participation impact estimate. Using data from the GAO report, we estimate that about \$301,000 in overpayments could have been avoided using the computer match. Since the states featured in the GAO study accounted for 29 percent of all benefits, applying the study estimates nationally would have saved nearly \$1.1 million in FY 1997.

No adjustments were made to account for caseload changes, since recent data, as discussed earlier, does not show a correlation between the number of disqualified individuals and SNAP participation levels. Since 1997, the average monthly benefit has risen; we anticipate that the average monthly benefit will be about 85 percent higher in 2013 - 2017. (The American Recovery and Reinvestment Act of 2009 increased the maximum allotment by 13.6 in April 2009 and froze it until FY 2014.) Inflating the 1997 cost to capture 2013 benefit costs yields nearly \$2 million in savings.

We estimate that today, 64 percent of benefits were issued to States currently performing routine matches at initial certification. We then adjust for past and expected increases in the average monthly benefit, and assume a 10 percent false positive match rate. We estimate that the 2013 cost savings estimate will be \$1.1 million for States currently performing the match, with a five year savings of nearly \$6 million. We assume that the final regulation is published by October 1, 2012. We assume that 50 percent of the States currently not performing matches at recertification will start by January 1, 2013, and the remaining States will start by July 1, 2013, so the overall phase-in rate for 2013 is 75 percent. The 2013 cost savings by States newly performing the match will be nearly \$500,000, and the five year savings will be \$3 million.

Today, no States are performing matches at recertification, so all savings are “new” and not incorporated in the budget baseline. This proposal would require all States to perform a one-time match at recertification to capture cases not recently certified. The cost savings from disqualifying ineligible persons identified at recertification is adjusted downwards to account for the fact only new disqualifications would be identified. To estimate that, we computed the percentage of disqualifications that is for under a year (90 percent) and adjusted the estimate by that percentage. We also assumed that 10 percent of matches will be false positives. We

estimate that the 2013 cost savings will be \$1.1 million, with 75 percent of the matches run the first year; and the remainder matches run the second year. The five-year savings will be \$1.6 million.

The combined savings for matches against the eDRS performed at initial certification and recertification is nearly \$3 million in 2013 and \$8 million over the 2013-2017 five-year time period. Of that, \$1 million in 2013 savings comes from States currently performing the match and \$1.7 million comes from new States. For the five-year period, nearly \$6 million in savings comes from States currently performing the match and \$2.2 million comes from new States.

The total savings from the computer matches is estimated at \$73 million in 2013 and \$326 million for the five-year period of 2013-2017. Of this, an estimated \$324 million is incorporated in the current budget and \$2 million represents new savings.

Table 1. Cost Impact of Computer Match Requirements (Federal Outlays)

In millions of dollars

	2013	2014	2015	2016	2017	5-YEAR	2013 Participant Impact (in thousands)
<hr/>							
Mandatory prisoner verification match							
Baseline Savings	-25	-23	-23	-22	-22	-115	-64
New Savings	-0	-0	-0	-0	-0	-0	-0
Total Savings	-25	-23	-23	-22	-21	-115	-64
<hr/>							
Mandatory death master file match							
Baseline Savings	-45	-41	-40	-39	-38	-203	-100
New Savings	-0	-0	-0	-0	-0	-0	-0
Total Savings	-45	-41	-40	-39	-38	-203	-100
<hr/>							
Mandatory Disqualified Recipient							
Subsystem match							
Baseline Savings	-1	-1	-1	-1	-1	-6	-6
New Savings	-2	-1	-0	-0	-0	-2	-10
Total Savings	-3	-2	-1	-1	-1	-8	-16
<hr/>							
Total							
Baseline Savings	-71	-65	-64	-63	-61	-324	-170
New Savings	-2	-1	-0	-0	-0	-2	-10
Total Savings	-73	-65	-64	-63	-61	-326	-180

Note: Totals may not add up to the sum because of rounding.

Uncertainty: Because FNS lacks administrative or survey data that provides information about deceased persons, prisoners, and disqualified persons that are reported as part of

households receiving SNAP, this estimate relied on small GAO studies run on a handful of States in the mid 1990s, and applying the impacts to the National Program, as operating today. To the extent that these small GAO studies are not nationally representative, the estimate will be skewed. FNS has no way to determine the size or direction of any bias based on the reliance of the GAO studies.

Our estimates also assume that the number of deceased persons identified by the match on SSA records is directly proportional to past and projected changes in SNAP caseloads. If the number of deceased persons identified by the match grows more quickly or slowly than the number of SNAP participants, the estimates will be biased.

Likewise, we assume that the number of households claiming prisoner members and thus losing benefits as a result of the match is directly proportional to past and projected changes in SNAP caseloads and the number of individuals incarcerated. If the number of prisoners identified by the match grows more quickly or more slowly than the number of SNAP participants or than the number of prisoners, the estimates will be biased.

Finally, we assume that the number of disqualified individuals has remained fairly constant over the past decade.

In all three cases, FNS has no way to determine the size or direction of the bias.

Because of these issues, there is a moderate degree of uncertainty with these estimates.

Societal Costs. While this regulatory impact analysis details the expected impacts on SNAP costs affected by the provisions described above, it does not provide an estimate of the overall social costs of the provisions, nor does it include a monetized estimate of the benefits they bring to society. FNS anticipates that the provisions will improve Program operations and strengthen Program integrity.

Rule Title: Supplemental Nutrition Assistance Program: Electronic Disqualified Recipient System Reporting and Computer Matching Requirements that Affect the Supplemental Nutrition Assistance Program RIN 0584-AB51

<u>Category</u>	<u>Primary Estimate</u>	<u>Minimum Estimate</u>	<u>Maximum Estimate</u>	
<u>BENEFITS</u>				
Annualized, monetized Benefits	Not applicable			
Annualized, quantified but unmonetized, benefits	Not applicable			
Qualitative (unquantified) benefits	Not applicable			
<u>COSTS</u>				
Annualized monetized costs	Not applicable			
Qualitative (unquantified) costs	Not applicable			
<u>TRANSFERS</u>				
Annualized monetary transfers: “on budget”	\$180 million	\$180 million	\$180 million	Regulatory Impact Analysis
From whom to whom	Funds that would have been received by ineligible participants are not issued, representing savings to the tax payer.			
Annualized monetized transfers: “off-budget”	Not applicable			
From whom to whom?	Not applicable			

Regulatory Flexibility Act

This rule has been reviewed with regard to the requirements of the Regulatory Flexibility Act (5 U.S.C. 601-612). The Administrator of the Food and Nutrition Service has certified that this rule will not have a significant economic impact on a substantial number of small entities. State and local welfare agencies will be the most affected to the extent that they administer the Program. Applicants may be affected to the extent that matching client information with records in eDRS, PVS and Death Master Files may identify a client as disqualified, preventing them from Program participation.

Unfunded Mandates Reform Act

Title II of the Unfunded Mandate Reform Act of 1995 (UMRA) established requirements for Federal agencies to assess the effects of their regulatory actions on State, local and tribal governments, and the private sector. Under Section 202 of UMRA, FNS generally must prepare a written statement, including a cost-benefit analysis, for proposed and final rules with “Federal mandates” that may result in expenditures to State, local, or tribal governments in the aggregate, or to the private sector, of \$100 million or more in any one year. When such a statement is needed for a rule, section 205 of UMRA generally requires FNS to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, more cost-effective or least burdensome alternative that achieves the objectives of the rule. This rule contains no Federal mandates (under the regulatory provisions of Title II of UMRA) for State, local and tribal governments, or the private sector, of \$100 million or more in any one year. Therefore, this rule is not subject to the requirements of sections 202 and 205 of UMRA.

Executive Order 12372

The Supplemental Nutrition Assistance Program is listed in the Catalog of Federal Domestic Assistance under No. 10.551. For the reasons set forth in the Final Rule codified in 7 CFR part 3015, Subpart V and related Notice (48 FR 29115), this Program is excluded from the scope of Executive Order 12372, which requires intergovernmental consultation with State and local officials.

Federalism Summary Impact Statement

Executive Order 13132 requires Federal agencies to consider the impact of their regulatory actions on State and local governments. Where such actions have federalism implications, agencies are directed to provide a statement included in the preamble to the regulations describing the agency's consideration in terms of the three categories called for under section (6)(b)(2)(B) of Executive Order 13132. In adherence with verification laws, this final rule allows for little State agency flexibility on when and how States must match SNAP recipients with SSA Death Master Files, eDRS records, and PVS records. FNS understands that State flexibility is important and will work with each State agency through a waiver process if they can make a reasonable argument for a more efficient procedure that would still comply with the law.

Was there Prior Consultation with State Officials?

Prior to drafting this final rule, FNS consulted with State and local agencies at various times. FNS regional offices have formal and informal discussions with State and local officials on an ongoing basis regarding program implementation and policy issues. This arrangement allows State and local agencies to provide comments that form the basis for many discretionary decisions in this and other SNAP rules. FNS has responded to

numerous written requests for policy guidance on IPV disqualification data reporting. Also, guidance for the prisoner verification and deceased data matching programs were implemented by agency directive with the consultation and input from State and local SNAP agencies. Finally, FNS presented ideas and received feedback on Program policy at various National, State, and professional conferences regarding the matching requirements in this rule.

What is the Nature of Concern and the Need to Issue This Rule?

FNS believes that it is important to standardize matching procedures to provide quality services to all SNAP participants and qualified applicants while ensuring that SNAP benefits are issued only to qualified individuals and households. In doing so, FNS and State agencies contribute to the success and integrity of the Program, garnering public support and user confidence in SNAP.

State and local SNAP agencies, however, want flexibility in Program administration. To the extent possible, FNS will consider alternate means of meeting the objectives of the law and has considered State comments in finalizing this rule.

What is the Extent to Which FNS Meets Those Concerns?

This rule contains changes that are required by law and were implemented by agency directives in response to the implementation time frames required in legislation. The changes to SNAP rules describing State agency responsibility for reporting IPV information will clarify how State agencies access disqualification information and follow-up on it, as well as provide for greater flexibility to State agencies for processing, retaining and sharing disqualification information. FNS is not aware of any case where the discretionary provision of this rule would preempt State law.

Executive Order 12988

FNS has considered the impact of the final rule on State and local agencies. This rule is intended to have a preemptive effect with respect to any State and local laws, regulations or policies, which conflict with its provisions or would otherwise impede its full implementation. Prior to any judicial challenge to the provisions of this rule, or the application of its provisions, all applicable administrative procedures must be exhausted.

This rule makes changes to the verification procedures for prisoner and deceased person data match programs, as well as reinforces requirements for disqualified recipient reporting and computer match benefits adjustments, as required by law. These procedures for matching prisoner and deceased persons were implemented by agency directives in May 1999 and February 2000, respectively, in response to implementation timeframes required in legislation. These changes to SNAP rules describing State agency responsibilities for reporting IPV information will clarify access and follow-up procedures for processing, retaining and sharing disqualification information.

Executive Order 13175

Executive Order 13175 requires Federal agencies to consult and coordinate with Tribes on a government-to-government basis on policies that have Tribal implications, including regulations, legislative comments or proposed legislation, and other policy statements or actions that have substantial direct effects on one or more Indian Tribes, on the relationship between the Federal Government and Indian Tribes, or on the distribution of power and responsibilities between the Federal Government and Indian Tribes. In late 2010 and early 2011, USDA engaged in a series of consultative sessions to obtain input

by Tribal officials or their designees concerning the effect of this and other rules on Tribes or Indian Tribal governments, or whether this rule may preempt Tribal law.

Reports from the consultative sessions will be made part of the USDA annual reporting on Tribal Consultation and Collaboration. USDA will offer future opportunities, such as webinars and teleconferences, for collaborative conversations with Tribal leaders and their representatives concerning ways to improve rules with regard to their affect on Indian country.

We are unaware of any current Tribal laws that could be in conflict with the final rule.

Civil Rights Impact Analysis

FNS has reviewed this rule in accordance with Department Regulation 4300-4, “Civil Rights Impact Analysis,” to identify and address any major civil rights impacts the rule might have on minorities, women and persons with disabilities. After careful review of the rule’s intent and provisions, and the characteristics of SNAP households and individual participants, FNS has determined that there is no way to determine their effect on any of the protected classes. The changes required to be implemented by law have already been implemented and are further clarified in this regulation. Regulations in § 272.6 specifically state that “State agencies shall not discriminate against any applicant or participant in any aspect of program administration, including, but not limited to, the certification of households, the issuance of coupons, the conduct of fair hearings, or the conduct of any other program service for reasons of age, race, color, sex, handicap, religious creed, national origin, or political beliefs.”

Discrimination in any aspect of program administration is prohibited, stated in

§ 272.6 and title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d). Enforcement action may be brought under any applicable federal law, thus enabling FNS to implement verification standards mandating that SNAP State agencies systematize their application process. This would ensure that those who qualify are given a just amount of SNAP support and that those that do not qualify are prohibited from receiving SNAP benefits. Title VI complaints shall be processed in accordance with 7 CFR Part 15. Where State agencies have options, and they choose to implement a certain provision, they must implement it in such a way that it complies with the regulations in §272.6.

Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (44 U.S.C. Chap. 35; see 5 CFR 1320), requires that the Office of Management and Budget (OMB) approve all collections of information by a Federal agency from the public before they can be implemented. Respondents are not required to respond to any collection of information unless it displays a current, valid OMB control number. This rule does not contain new information collection requirements subject to approval by OMB under the Paperwork Reduction Act of 1995. Information collection requirements and burden associated with this rule have been approved as part of OMB# 0584-0064, “Application and Certification of Food Stamp Program Households” (expiration March 2013) and OMB# 0584-0492, “SNAP Repayment Demand and Program Disqualification” (expiration September 2014).

E-Government Act Compliance

FNS is committed to complying with the E-Government Act of 2002, to promote the use of the Internet and other information technologies to provide increased opportunities

for citizen access to government information and services, and for other purposes. The information collection associated with this regulation is available for electronic submission through eDRS, which complies with the Paperwork Reduction Act.

List of Subjects

7 CFR Part 272

Civil rights, Supplemental Nutrition Assistance Program, Grant programs-social programs, Reporting and recordkeeping requirements.

7 CFR Part 273

Administrative practice and procedure, Claims, Supplemental Nutrition Assistance Program, Fraud, Grant programs-social programs, Penalties, Reporting and recordkeeping requirements, Social Security.

For the reasons set out in the preamble, 7 CFR Parts 272 and 273 are amended as follows:

1. The authority citation for Parts 272 and 273 continues to read as follows:

Authority: 7 U.S.C. 2011-2036.

PART 272--REQUIREMENTS FOR PARTICIPATING STATE AGENCIES

2. In §272.1, paragraph (f) is revised to read as follows:

§272.1 General terms and conditions.

* * * * *

(f) Retention of records. Each State agency shall retain all Program records in an orderly fashion for audit and review purposes for no less than 3 years from the month of origin of each record. In addition:

(1) The State agency shall retain fiscal records and accountable documents for 3 years from the date of fiscal or administrative closure. Fiscal closure means that obligations for or against the Federal government have been liquidated. Administrative closure means that the State agency has determined and documented that no further action to liquidate the obligation is appropriate. Fiscal records and accountable documents include, but are not limited to, claims and documentation of lost benefits.

(2) Case records relating to intentional Program violation disqualifications and related notices to the household shall be retained indefinitely until the State agency obtains reliable information that the record subject has died or until FNS advises via the disqualified recipient database system edit report that all records associated with a particular individual, including the disqualified recipient database record, may be permanently removed from the database because of the individual's 80th birthday.

(3) Disqualification records submitted to the disqualified recipient database must be purged by the State agency that submitted them when the supporting documents are no longer accurate, relevant, or complete. The State agency shall follow a prescribed records management program to meet this requirement. Information about this program shall be available for FNS review.

* * * * *

3. New §§272.12, 272.13, and 272.14 are added to read as follows:

§272.12 Computer matching requirements.

(a) General purpose. The Computer Matching and Privacy Protection Act (CMA) of 1988, as amended, addresses the use of information from computer matching programs that involve a Federal System of Records. Each State agency participating in a computer matching program shall adhere to the provisions of the CMA if it uses an FNS system of records for the following purposes:

(1) Establishing or verifying initial or continuing eligibility for Federal Benefit Programs;

(2) Verifying compliance with either statutory or regulatory requirements of the Federal Benefit Programs; or

(3) Recouping payments or delinquent debts under such Federal Benefit Programs.

(b) Matching agreements. State agencies must enter into written agreements with USDA/FNS, consistent with 5 U.S.C. 552a(o) of the CMA, in order to participate in a matching program involving a USDA/FNS Federal system of records.

(c) Use of computer matching information. (1) A State agency shall not take any adverse action to terminate, deny, suspend, or reduce benefits to an applicant or recipient based on information produced by a Federal computer matching program that is subject to the requirements of the CMA, unless:

(i) The information has been independently verified by the State agency (in accordance with the independent verification requirements set out in the State agency's written agreement as required by paragraph (b) of this section) and a Notice of Adverse

Action or Notice of Denial has been sent to the household, in accordance with §273.2(f);
or

(ii) The Federal agency's Data Integrity Board has waived the two-step independent verification and notice requirement and notice of adverse action has been sent to the household, in accordance with §273.2(f).

(2) A State agency which receives a request for verification from another State agency, or from FNS pursuant to the provisions of §273.16(i) shall, within 20 working days of receipt, respond to the request by providing necessary verification (including copies of appropriate documentation and any statement that an individual has asked to be included in their file).

§272.13 Prisoner verification system (PVS).

(a) General. Each State agency shall establish a system to monitor and prevent individuals who are being held in any Federal, State, and/or local detention or correctional institutions for more than 30 days from being included in a SNAP household.

(b) Use of match data. State prisoner verification systems shall provide for:

(1) The comparison of identifying information about each household member, excluding minors, as that term is defined by each State, and one-person households in States where a face-to-face interview is conducted, against identifying information about inmates of institutions at Federal, State and local levels;

(2) The reporting of instances where there is a match;

(3) The independent verification of match hits to determine their accuracy;

(4) Notice to the household of match results;

(5) An opportunity for the household to respond to the match prior to an adverse action to deny, reduce, or terminate benefits; and

(6) The establishment and collections of claims as appropriate.

(c) Match frequency. State agencies shall make a comparison of match data for adult household members at the time of application and at recertification. States that opt to obtain and use prisoner information collected under Section 1611(e)(1)(I)(i)(I) of the Social Security Act (42 U.S.C. 1382(e)(1)(I)(i)(I)) shall be considered in compliance with this section. States shall enter into a computer matching agreement with the SSA under authority contained in 42 U.S.C. 405(r)(3).

§272.14 Deceased matching system.

(a) General. Each State agency shall establish a system to verify and ensure that benefits are not issued to individuals who are deceased.

(b) Data source. States shall use the SSA's Death Master File, obtained through the State Verification and Exchange System (SVES) and enter into a computer matching agreement with SSA pursuant to authority to share data contained in 42 U.S.C. 405(r)(3).

(c) Use of match data. States shall provide a system for:

(1) Comparing identifiable information about each household member against information from databases on deceased individuals. States shall make the comparison of matched data at the time of application and no less frequently than once a year.

(2) The reporting of instances where there is a match;

(3) The independent verification of match hits to determine their accuracy;

(4) Notice to the household of match results;

(5) An opportunity for the household to respond to the match prior to an adverse action to deny, reduce, or terminate benefits; and

(6) The establishment and collection of claims as appropriate.

PART 273 - CERTIFICATION OF ELIGIBLE HOUSEHOLDS

4. In §273.2, a new paragraph (f)(11) is added to read as follows:

§273.2 Office operations and application processing.

* * * * *

(f) * * *

(11) Use of disqualification data. (i) Pursuant to §273.16(i), information in the disqualified recipient database will be available for use by any State agency that executes a computer matching agreement with FNS. The State agency shall use the disqualified recipient database for the following purposes:

(A) Ascertain the appropriate penalty to impose based on past disqualifications in a case under consideration;

(B) Conduct matches as specified in § 273.16 on:

(1) Program application information prior to certification and for a newly added household member whenever that might occur; and

(2) The current recipient caseload at the time of recertification for a period of 1 year after the implementation date of this match. State agencies do not need to include minors, as that term is defined by each State.

(3) States having the ability to conduct a one-time match of their entire active caseload against active cases from the disqualified recipient database may do so and be exempted from the 1-year requirement to conduct matches at recertification.

(ii) State agencies shall not take any adverse action to terminate, deny, suspend, or reduce benefits to an applicant, or SNAP recipient, based on disqualified recipient match results unless the match information has been independently verified. The State agency shall provide to an applicant, or recipient, an opportunity to contest any adverse disqualified recipient match result pursuant to the provisions of §273.13.

(iii) Independent verification shall take place separate from and prior to issuing a notice of adverse action—a two-step process. Independent verification for disqualification purposes means contacting the applicant or recipient household and/or the State agency that originated the disqualification record immediately to obtain corroborating information or documentation to support the reported disqualification information in the intentional Program violation database.

(A) Documentation may be in any form deemed appropriate and legally sufficient by the State agency considering the adverse action. Such documentation may include, but shall not be limited to, electronic or hard copies of court decisions, administrative disqualification hearing determinations, signed disqualification consent agreements or administrative disqualification hearing waivers.

(B) A State may accept a verbal or written statement from another State agency attesting to the existence of the documentation listed in paragraph (f)(11)(iii)(A) of this section.

(C) A State may accept a verbal or written statement from the household affirming the accuracy of the disqualification information if such a statement is properly documented and included in the case record.

(D) If a State agency is not able to provide independent verification because of a lack of supporting documentation, the State agency shall so advise the requesting State agency or FNS, as appropriate, and shall take immediate action to remove the unsupported record from the disqualified recipient database in accordance with §273.16(i)(6).

(iv) Once independent verification has been received, the requesting State agency shall review and immediately enter the information into the case record and send the appropriate notice(s) to the record subject and any remaining members of the record subject's SNAP household.

(v) Information from the disqualified recipient database is subject to the disclosure provisions in §272.1(c) and the routine uses described in the most recent "Notice of Revision of Privacy Act System of Records" published in the **Federal Register**.

* * * * *

5. In §273.11, paragraph (c)(4)(i) is amended by adding a new sentence to the end of the paragraph to read as follows:

§273.11 Action on households with special circumstances.

* * * * *

(c) * * *

(4) * * *

(i) * * * However, a participating household is entitled to a notice of adverse action prior to any action to reduce, suspend or terminate its benefits, if a State agency determines that it contains an individual who was disqualified in another State and is still within the period of disqualification.

* * * * *

6. In §273.12:

- a. Paragraph (e)(3) introductory text is amended by removing the last six sentences and adding four new sentences in their place.
- b. Adding new paragraphs (e)(3)(i) and (e)(3)(ii); and
- c. The introductory text of paragraph (e)(4) is revised.

The additions and revision read as follows:

§273.12 Requirements for change reporting households.

* * * * *

(e) * * *

(3) * * * A State agency may require households to report the change on the appropriate monthly report or may handle the change using the mass change procedures in this section. If the State agency requires the household to report the information on the monthly report, the State agency shall handle such information in accordance with its normal procedures. Households that are not required to report the change on the monthly report, and households not subject to monthly reporting, shall not be responsible for reporting these changes. The State agency shall be responsible for automatically

adjusting these households' SNAP benefit levels in accordance with either paragraph (e)(3)(i) or (e)(3)(ii) of this section.

(i) The State agency may make mass changes by applying percentage increases communicated by the source agency to represent cost-of-living increases provided in other benefit programs. These changes shall be reflected no later than the second allotment issued after the month in which the change becomes effective.

(ii) The State agency may update household income information based on cost-of-living increases supplied by a data source covered under the Computer Matching and Privacy Protection Act of 1988 (CMA) in accordance with §272.12. The State agency shall take action, including proper notices to households, to terminate, deny or reduce benefits based on this information if it is considered verified upon receipt under §273.2(f)(9). If the information is not considered verified upon receipt, the State agency shall initiate appropriate action and notice in accordance with §273.2(f)(9).

(4) Notice for mass change. When the State agency makes a mass change in SNAP eligibility or benefits by simultaneously converting the caseload, or that portion of the caseload that is affected, using the percentage increase calculation provided for in §273.12(e)(3)(i), or by conducting individual desk reviews using information not covered under the Computer Matching and Privacy Protection Act (CMA) in place of a mass change, it shall notify all households whose benefits are reduced or terminated in accordance with the requirements of this paragraph, except for mass changes made under §273.12(e)(1); and

* * * * *

7. In §273.13:

- a. Paragraph (a)(2) is amended by adding two new sentences to the end of the paragraph;
- b. Paragraph (b)(1) is revised; and
- c. Paragraph (b)(7) is amended by removing the first sentence of the paragraph and replacing it with three new sentences.

The additions and revision read as follows:

§273.13 Notice of adverse action.

(a) * * *

(2) * * * A notice of adverse action that combines the request for verification of information received through an IEVS computer match shall meet the requirements in §273.2(f)(9). A notice of adverse action that combines the request for verification of information received through a SAVE computer match shall meet the requirements in §273.2(f)(10).

* * * * *

(b) * * *

(1) The State initiates a mass change through means other than computer matches as described in §273.12(e)(1), (e)(2), or (e)(3)(i).

* * * * *

(7) A household member is disqualified for an intentional Program violation in accordance with §273.16, or the benefits of the remaining household members are reduced or terminated to reflect the disqualification of that household member, except as provided in §273.11(c)(3)(i). A notice of adverse action must be sent to a currently

participating household prior to the reduction or termination of benefits if a household member is found through a disqualified recipient match to be within the period of disqualification for an intentional Program violation penalty determined in another State. In the case of applicant households, State agencies shall follow the procedures in §273.2(f)(11) for issuing notices to the disqualified individual and the remaining household members. * * *

* * * * *

8. In §273.16, paragraph (i) is revised to read as follows:

§273.16 Disqualification for intentional program violation.

* * * * *

(i) Reporting requirements. (1) Each State agency shall report to FNS information concerning individuals disqualified for an intentional Program violation, including those individuals disqualified based on the determination of an administrative disqualification hearing official or a court of appropriate jurisdiction, and those individuals disqualified as a result of signing either a waiver of right to a disqualification hearing or a disqualification consent agreement in cases referred for prosecution. This information shall be submitted to FNS so that it is received no more than 30 days after the date the disqualification took effect.

(2) State agencies shall report information concerning each individual disqualified for an intentional Program violation to FNS. FNS will maintain this information and establish the format for its use.

(i) State agencies shall report information to the disqualified recipient database in accordance with procedures specified by FNS.

(ii) State agencies shall access disqualified recipient information from the database that allows users to check for current and prior disqualifications.

(3) The elements to be reported to FNS are name, social security number, date of birth, gender, disqualification number, disqualification decision date, disqualification start date, length of disqualification period (in months), locality code, and the title, location and telephone number of the locality contact. These elements shall be reported in accordance with procedures prescribed by FNS.

(i) The disqualification decision date is the date that a disqualification decision was made at either an administrative or judicial hearing, or the date an individual signed a waiver to forego an administrative or judicial hearing and accept a disqualification penalty.

(ii) The disqualification start date is the date the disqualification penalty was imposed by any of the means identified in §273.16(i)(3)(i).

(iii) The locality contact is a person, position or entity designated by a State agency as the point of contact for other State agencies to verify disqualification records supplied to the disqualified recipient database by the locality contact's State.

(4) All data submitted by State agencies will be available for use by any State agency that is currently under a valid signed Matching Agreement with FNS.

(i) State agencies shall, at a minimum, use the data to determine the eligibility of individual Program applicants prior to certification, and for 1 year following implementation, to determine the eligibility at recertification of its currently participating

caseload. In lieu of the 1-year match at recertification requirement and for the same purpose, State agencies may conduct a one-time match of their participating caseload against active disqualifications in the disqualified recipient database. State agencies have the option of exempting minors from this match.

(ii) State agencies shall also use the disqualified recipient database for the purpose of determining the eligibility of newly added household members.

(5) The disqualification of an individual for an intentional Program violation in one political jurisdiction shall be valid in another. However, one or more disqualifications for an intentional Program violation, which occurred prior to April 1, 1983, shall be considered as only one previous disqualification when determining the appropriate penalty to impose in a case under consideration, regardless of where the disqualification(s) took place. State agencies are encouraged to identify and report to FNS any individuals disqualified for an intentional Program violation prior to April 1, 1983. A State agency submitting such historical information should take steps to ensure the availability of appropriate documentation to support the disqualifications in the event it is contacted for independent verification.

(6) If a State determines that supporting documentation for a disqualification record that it has entered is inadequate or nonexistent, the State agency shall act to remove the record from the database.

(7) If a court of appropriate jurisdiction reverses a disqualification for an intentional Program violation, the State agency shall take action to delete the record in the database that contains information related to the disqualification that was reversed in accordance with instructions provided by FNS.

(8) If an individual disputes the accuracy of the disqualification record pertaining to him/herself the State agency submitting such record(s) shall be responsible for providing FNS with prompt verification of the accuracy of the record.

(i) If a State agency is unable to demonstrate to the satisfaction of FNS that the information in question is correct, the State agency shall immediately, upon direction from FNS, take action to delete the information from the disqualified recipient database.

(ii) In those instances where the State agency is able to demonstrate to the satisfaction of FNS that the information in question is correct, the individual shall have an opportunity to submit a brief statement representing his or her position for the record. The State agency shall make the individual's statement a permanent part of the case record documentation on the disqualification record in question, and shall make the statement available to each State agency requesting an independent verification of that disqualification.

* * * * *

/signed/

Kevin Concannon
Under Secretary
Food, Nutrition, and Consumer Services

Date

PROPOSED RULE
SUPPLEMENTAL NUTRITION ASSISTANCE PROGRAM:
FARM BILL OF 2008 RETAILER SANCTIONS

Note: Food, Nutrition, and Consumer Services Under Secretary Kevin Concannon signed the following document on July 10, 2012, and the agency has submitted it for publication in the *Federal Register* (FR).

While we have taken steps to ensure the accuracy of this version of the document, it is not the official version. Please refer to the official version in a forthcoming FR publication, which will appear at www.federalregister.gov and on www.regulations.gov.

Once the official version of this document is published in the FR, this version will be removed from the web and replaced with a link to the official version.

Billing Code: 3410-30-P

DEPARTMENT OF AGRICULTURE

Food and Nutrition Service

7 CFR Parts 278 and 279

RIN 0584-AD88

Supplemental Nutrition Assistance Program: Farm Bill of 2008 Retailer Sanctions

AGENCY: Food and Nutrition Service (FNS), USDA

ACTION: Proposed rule.

SUMMARY: The Department is proposing changes to the Supplemental Nutrition Assistance Program (SNAP) (formerly the Food Stamp Program) retailer sanction regulations in accordance with amendments made to Sections 7, 9, and 12 of the Food and Nutrition Act of 2008 (“the Act”) by the Food, Conservation, and Energy Act of 2008, Pub. L. 110-246 (“the 2008 Farm Bill”). The proposal would update SNAP retailer sanction regulations to include authority granted in the 2008 Farm Bill to allow FNS to impose a civil penalty in addition to disqualification, raise the allowable penalties per violation, and provide greater flexibility to USDA for minor violations.

DATES: Comments must be received on or before [insert 60 days from date of publication in the Federal Register] to be assured of consideration.

ADDRESSES: The Food and Nutrition Service, USDA, invites interested persons to submit comments on this proposed rule. Comments may be submitted by one of the following methods:

- **Federal e-Rulemaking Portal:** Go to <http://www.regulations.gov>. Preferred method; follow the on-line instructions for submitting comments on docket [insert docket number].

- Mail: Comments should be addressed to Andrea Gold, Director, Benefit Redemption Division, Rm. 426, 3101 Park Center Drive, Alexandria, Virginia 22302.

All comments submitted in response to this proposed rule will be included in the record and will be made available to the public. Please be advised that the substance of the comments and the identity of the individuals or entities submitting the comments will be subject to public disclosure. Food and Nutrition Service (FNS) will make the comments publicly available on the Internet via <http://www.regulations.gov>.

FOR FURTHER INFORMATION CONTACT: Andrea Gold, Director, Benefit Redemption Division, Rm. 426, 3101 Park Center Drive, Alexandria, Virginia 22302, 703-305-2434.

SUPPLEMENTARY INFORMATION:

Executive Summary

I. Purpose of the Regulatory Action:

The purpose of this rule is to implement the greater flexibility provided by the 2008 Farm Bill in assessing SNAP sanctions against retail food stores and wholesale food concerns found in violation of program rules by imposing a civil penalty in addition to disqualification, raising the allowable penalties per violation, and providing greater flexibility to USDA for minor violations. This rule is necessary in order to improve the integrity of the program, deter participating retailers from committing program violations to ensure voluntary compliance, and adjust civil penalties to better reflect the value of redemptions. The legal authority for this proposed rule is addressed by Sections 7, 9 and 12 of the Act, as amended by sections 4115 and 4132 of the 2008 Farm Bill.

II. Summary of the Major Provisions:

Trafficking Civil Penalty and Trafficking Civil Money Penalty. Trafficking is the exchange of SNAP benefits for cash and is the most serious violation of program rules and firms can be permanently disqualified from participating in SNAP for such violations. It significantly undermines the integrity of the program and diverts funds from their intended use. Section 12 of the Act provides FNS greater flexibility in assessing sanctions against retailers that traffic benefits by adding a new trafficking civil penalty in addition to permanent disqualification. This sanction is designed to recoup the government provided funds diverted from their intended use by basing the amount of the civil penalty on a retail food store's SNAP redemptions. Current regulations allow trafficking civil money penalties in lieu of permanent disqualification; not in addition to the disqualification. The change ensures more equitable treatment in the way civil penalties will be assessed while increasing the deterrent effect against large scale fraud that may result in significant administrative penalties beyond existing criminal penalties.

Sale of Common Ineligibles. The sale of common ineligibles, such as paper products and cooking supplies, is the least egregious violation against SNAP and firms can be assessed a disqualification from 6 months to 10 years for such violations. Analysis by FNS indicates that many firms assessed a 6-month disqualification for the sale of ineligibles frequently go out of business because they are located in areas with higher concentration of SNAP recipients. This rule proposes to apply disqualifications only to repeat offenders or more severe violators; first time offenders selling only common ineligibles would be assessed a newly established civil penalty of \$1,000 per violation in lieu of being disqualified. This would allow owners to take corrective actions to prevent such violations in the future.

Civil Money Penalties: Hardship, Transfer of Ownership, Trafficking in Lieu of Permanent Disqualification. Pursuant to Section 12 of the Act, this rule proposes to assess civil money penalties of up to \$100,000 per violation for hardship or transfer of ownership. The civil money penalty for a trafficking in lieu of permanent disqualification will continue to be capped at an overall limit of \$59,000 per investigation. The rule also proposes to allow retailers an additional 15 days to obtain and submit a collateral bond, which is currently required when civil money penalties are imposed. Increasing the time from 15 days to 30 days is in response to concerns from the retailer community that it has become more difficult to find financial institutions offering these services at competitive prices.

Fines for Transactions Conducted without the Presence of an EBT Card. This rule also proposes a new fine involving EBT transactions. If the point-of-sale (POS) device that reads the magnetic stripe of the EBT card cannot read the card, the alternative methods to complete the transaction involve manual key entry of the EBT card number or the use of a voucher. In all EBT transactions the card must be present. FNS receives complaints from SNAP recipients who have had their benefits stolen by firms who conducted transactions without the EBT card being present, and there is no rule that allows FNS to take action against these firms. This provision allows FNS to assess fines against firms that engage in this activity.

III. Costs and Benefits

USDA estimates total sanctions to be assessed from this rule to be approximately \$175 million per year. These provisions are expected to affect a very few, mostly small, retailers, in each of the next 5 years. Most of the provisions will result in larger or additional penalties for firms who commit program violations.

The proposed rule is expected improve program integrity by increasing sanctions and civil penalties on the small number of authorized firms that commit program violations. The vast majority of retailers – those that abide by the rules – will be unaffected by the proposed changes. The purposes of increased sanctions on the few authorized firms that willingly violate program rules will be to provide additional deterrence to strengthen program integrity and increase public confidence in stewardship of program administration.

Summary of Federal Costs and Benefits Per Year

	Costs (in millions of dollars)	Number of Affected Retailers	Benefits
Implementation Costs	\$0.176 (First year only)	0	
Denials and Withdrawals	\$0	0	Improve program integrity
Trafficking Civil Penalty ¹	(\$174)	1,211	Improve program integrity
Sale of Common Ineligibles ¹	(\$1.034)	292	Improve program integrity; Reduce number of retailers facing 6-month disqualification
New Maximum Limits on Civil Money Penalties ¹	(\$0.256)	100	Improve program integrity
Fines for Transactions Without EBT Cards	*	1-3	Improve program integrity
Total Cost	(\$175.1)		

¹The majority of penalties are turned over to Treasury and never collected.

Executive Order 12866 and Executive Order 13563

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility.

This proposed rule has been designated economically significant. Accordingly, the rule has been reviewed by the Office of Management and Budget. A summary of the regulatory impact analysis is included below. The full analysis is available through www.regulations.gov in the docket for this rule (RIN 0584-AD88).

Regulatory Impact Analysis Summary

Need for Action

The proposed rule is needed to implement expanded authority and flexibility for FNS to assess SNAP retailer penalties as provided in the 2008 Farm Bill.

Benefits

Implementing Farm Bill sanctions and updating regulatory language will strengthen deterrence of violations among retailers, help clarify program requirements and improve program integrity.

Costs

FNS estimates that the cost impact of this proposed rule is minimal. The primary costs anticipated are those FNS will bear in relation to updating systems, training materials and letters to reflect the new regulations; as well as informing participating stores of the changes. The costs are expected to be minimal as the changes may be incorporated into planned, regularly scheduled maintenance updates and mailings that already exist to inform participating stores of relevant program changes.

One provision in this rulemaking will also impact some third party providers that contract with retail food stores or wholesale food concerns who wish to purchase point-of-sale (POS) equipment for their stores to support multiple forms of payment beyond just SNAP electronic benefit transfer (EBT) cards. While the provision does not add any new rules that do not exist today, providing only an enforcement mechanism to ensure that third party providers follow those existing requirements, there will be some cost impact on the providers who have failed to comply with these rules to date. The vast majority of third party POS equipment providers, however, already meet existing requirements as specified in part 7 CFR 274. Therefore, FNS does not anticipate that this provision will have a significant cost impact.

The rule will have no cost impact on retail food stores or wholesale food concerns, as the rule only implements greater authority and flexibility provided by the Act, but does not change what constitutes a violation. Those firms must continue to follow the same program rules as are in place today to prevent any violations.

Accounting Statement

	Primary Estimate	Year Dollar	Discount Rate	Period Covered
Benefits				

Qualitative: The proposed changes to the retailer sanction regulations will improve program integrity by increasing the deterrent effect of sanctions on the small number of authorized firms that commit program violations.				
Costs				
Annualized Monetized (\$millions/year)		2013	7%	FY2013-2017
		2013	3%	
Transfers				
Annualized Monetized (\$millions/year)	\$175	2013	7%	FY2013-2017
	\$175	2013	3%	
From Authorized Firms to the Federal Government.				

Regulatory Flexibility Act

This rule proposes changes to SNAP by issuing regulations in accordance with amendments made to Sections 7, 9 and 12 of the Act. The proposal would codify provisions to provide FNS greater flexibility to assess a disqualification, civil penalty, or both; revise the caps currently in place on civil money penalties to reflect the new limits provided by the Act; and remove penalties that pertain to the issuance and redemption of paper coupons that are no longer relevant. Each year, FNS assesses a sanction, either a disqualification or a civil money penalty, against less than 1% of the participating stores. Of those impacted roughly half commit trafficking violations and will face stiffer sanctions as a result of this proposed rule. A portion of the remaining retail food stores who are disqualified for 6 months under the current rules due to the sale of common ineligibles would now receive a civil penalty instead of a disqualification. Because disqualifications of any duration increase the risk a business may be forced to close, substituting a civil penalty could potentially allow the sanctioned business to continue to operate.

The Regulatory Flexibility Act (5 U.S.C. 601-612) requires Agencies to analyze the impact of rulemaking on small entities and consider alternatives that would minimize any significant impacts on a substantial number of small entities. Pursuant to that review and based on the limited population of retail food stores impacted, this rule is certified not to have a significant impact on a substantial number of small entities.

Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104-4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and tribal governments, and the private sector. Under Section 202 of the UMRA, the Department generally must prepare a written statement, including a cost/benefit analysis, for proposed and final rules with Federal mandates that may result in expenditures to State, local, or tribal governments, in the aggregate, or to the private sector, of \$100 million or more in any one year. When such a statement is needed for a rule, section 205 of the UMRA generally requires the Department to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, more cost-effective or least burdensome alternative that achieves the objectives of the rule.

This rule does not contain Federal mandates (under the regulatory provisions of Title II of the UMRA) that impose costs on State, local, or tribal governments or to the private sector of \$100 million or more in any one year. This rule is, therefore, not subject to the requirements of sections 202 and 205 of the UMRA.

Executive Order 12372

SNAP is listed in the Catalog of Federal Domestic Assistance under No. 10.551. For the reasons set forth in the Final Rule codified in 7 CFR part 3015, Subpart V and related Notice (48 FR 29115), this Program is excluded from the scope of Executive Order 12372, which requires intergovernmental consultation with state and local officials.

Executive Order 13132

Executive Order 13132 requires Federal agencies to consider the impact of their regulatory actions on State and local governments. Where such actions have federalism implications, agencies are directed to provide a statement for inclusion in the preamble to the regulations describing the agency's considerations in terms of the three categories called for under section (6)(b)(2)(B) of Executive Order 13132. FNS has considered the impact of this rule on State and local governments and has determined that this rule does not have federalism implications. This rule does not impose substantial or direct compliance costs on State and local governments. Therefore, under Section 6(b) of the Executive Order, a federalism summary impact statement is not required.

Executive Order 12988

This rule has been reviewed under Executive Order 12988, Civil Justice Reform. This rule is intended to have preemptive effect with respect to any State or local laws, regulations or policies which conflict with its provisions or which would otherwise impede its full implementation. This rule is not intended to have retroactive effect unless specified in the DATES section of the final rule. Prior to any judicial challenge to the provisions of this rule or the application of its provisions, all applicable administrative procedures must be exhausted.

Executive Order 13175 - Consultation and Coordination With Indian Tribal Governments

E.O. 13175 requires Federal agencies to consult and coordinate with tribes on a government-to-government basis on policies that have tribal implications, including regulations, legislative comments or proposed legislation, and other policy statements or actions that have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes. In late 2010 and early 2011, USDA engaged in a series of consultative sessions to obtain input by Tribal officials or their designees concerning the impact of this rule on the tribe or Indian Tribal governments. The Joint Consultation sessions were coordinated by USDA's Office of Tribal Relations and held on the following dates and locations:

1. Rapid City, SD – October 28-29, 2010
2. Oklahoma City, OK – November 3-4, 2010
3. Minneapolis, MN – November 8-9, 2010
4. Seattle, WA – November 22-23, 2010
5. Nashville, TN – November 29-30, 2010
6. Albuquerque, NM – December 1-2, 2010
7. Anchorage, AK – January 10-11, 2011

There were no comments about this regulation during any of the aforementioned Tribal Consultation sessions.

Reports from these consultations are part of the USDA annual reporting on Tribal consultation and collaboration. FNS will respond in a timely and meaningful manner to Tribal government requests for consultation concerning this rule. Currently, FNS provides regularly

scheduled quarterly consultation sessions through the end of FY2012 as a venue for collaborative conversations with Tribal officials or their designees.

Civil Rights Impact Analysis

FNS has reviewed this rule in accordance with Departmental Regulations 4300-4, “Civil Rights Impact Analysis,” and 1512-1, “Regulatory Decision Making Requirements.” This rule is not intended to have a differential impact on minority owned or operated business establishments, and woman owned or operated business establishments that participate in SNAP. FNS does not collect or maintain any data on the nationality, ethnicity, or gender of owners of participating retail food stores. Therefore, those factors have no impact on how the Agency identifies fraud or implements sanctions against firms found violating program rules.

Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (44 U.S.C. Chap. 35; see 5 CFR 1320) requires the Office of Management and Budget (OMB) approve all collections of information by a Federal agency before they can be implemented. Respondents are not required to respond to any collection of information unless it displays a current valid OMB control number. This rule does not contain information collection requirements subject to approval by OMB under the Paperwork Reduction Act of 1995.

E-Government Act Compliance

The Food and Nutrition Service is committed to complying with the E-Government Act, to promote the use of the Internet and other information technologies to provide increased opportunities for citizen access to Government information and services, and for other purposes.

Background

This rulemaking proposes to implement the greater flexibility provided by the 2008 Farm Bill section 4132 in assessing sanctions and civil penalties against retail and wholesale food concerns that violate program rules . Furthermore, in accordance with Section 4115 (Issuance and Use of Program Benefits) of the 2008 Farm Bill, this rulemaking proposes to update 7 CFR parts 278 and 279 to reflect the Program's issuance of benefits through EBT systems. FNS recognizes that this proposed rule amends a few but not all of the references to coupon(s) and food stamp(s) in part 278 to reflect the Act's de-obligation of coupons. FNS plans to address this technical discrepancy in future rulemaking.

7 CFR Part 278 – Participation of Retail Food Stores

The general provisions addressed in part 278 are required by Sections 9 and 12 of the Act, as amended by the 2008 Farm Bill. The discussion below and the subsequent regulatory language for this part provide additional details to address operational processes and clarify current policy to align the regulations with authority provided in the Act.

Denial and Withdrawals

The current regulations governing retail food store and wholesale food concern participation in SNAP stipulates that FNS shall deny new applicants or withdraw participating firms that fail

to pay civil money penalties or fines assessed under part 278. In accordance with the Act, FNS proposes to revise the denial and withdrawal language to extend this authority to unpaid portions of the newly introduced civil penalties in addition to those already covered. In addition, the language would be revised to clarify that FNS may deny or withdraw a firm if any member of ownership committed an intentional program violation and was disqualified as a SNAP recipient. This provision is necessary because a person, who violates program rules as a recipient, lacks the necessary business integrity and responsibility expected of a store owner who must train employees and oversee operations to ensure that SNAP EBT transactions are conducted in accordance with Department rules. Allowing a formerly disqualified program recipient the ability to conduct transactions would create an unnecessary risk to the integrity of the program.

In addition, §278.2(b) specifies FNS policy on equal treatment at the food retailer, ensuring that program recipients are treated in the same manner as non-program recipients. This proposed rule introduces a new provision that would allow FNS to deny or withdraw a firm for failing to adhere to §278.2(b) by singling out program recipients for inequitable treatment compared to a firm's other customers. This provision is in response to complaints submitted to FNS of stores that implement policies targeted against SNAP recipients and not applied equally to all customers. An example would be stores that institute a minimum purchase requirement for customers using SNAP as a form of payment, but fail to apply the same requirement on credit, cash, or debit card customers. Retail food stores and wholesale food concerns found out of compliance with this provision would be provided an opportunity to come into compliance prior to being withdrawn.

FNS estimates that half of all participating firms opt to purchase POS equipment from third party providers and do not utilize government provided POS equipment. A small percentage of

those firms have purchased POS equipment from providers that fail to properly adhere to existing requirements for equipment in part 274. Those requirements include informing the recipient as to the transaction and their remaining balance, prohibiting the recipient's personal information from being printed on a receipt to protect their privacy, and providing accurate information to FNS to better help FNS identify and target program fraud. In particular, FNS requires that each POS device is identified by a unique terminal ID and that the unique ID is reported to FNS along with transaction information. Failure to provide unique terminal ID's makes it more difficult for FNS to monitor transaction activity within a firm and may lead to inaccurate assessments that divert FNS resources from taking appropriate actions against stores that violate the Program. This proposed rule would allow FNS to deny or withdraw a firm that opts to purchase or lease POS equipment from a third party provider that fails to comply with part 274, particularly with the requirement to provide unique terminal ID's. There are many third party equipment providers and almost all comply with these requirements; therefore, this change is not expected to result in a significant number of retailer withdrawals. FNS would inform retailers in advance of this requirement so they can use this information to ensure that the provider from whom they elect to purchase equipment meets the requirements. Moreover, retail food stores and wholesale food concerns found out of compliance with this provision would be provided an opportunity to switch providers to avoid being withdrawn.

Trafficking Civil Penalty and Trafficking Civil Money Penalty

Trafficking is the exchange of SNAP benefits for cash and is the most serious violation of program rules. Trafficking represents collusion between a retail food concern and a program recipient. The firm conducts a transaction through the EBT system and provides the recipient

with cash, typically at a discounted rate, that both deprives the recipient of the full value of their benefits intended for eligible food products necessary to help provide the nutritional needs of their household, as well as provides a profit directly to the firm. It significantly undermines the integrity of the program and diverts funds from their intended use. As a result, Congress has been clear in its intent that the administrative penalties for trafficking be severe and has stipulated that such violations result in the permanent disqualification of a firm.

In the Food Stamp Act of 1977, Congress granted FNS the authority to either disqualify a firm for program violations or impose a civil money penalty, but not both. With the Food and Nutrition Act of 2008, Congress removed this constraint, specifically providing USDA greater flexibility in assessing sanctions both for retail food stores and wholesale food concerns with lesser violations as well as for retail food stores and wholesale food concerns that commit the most egregious offenses, such as trafficking. Pursuant to that change, this proposed rule would add a new trafficking civil penalty in addition to the permanent disqualification. With this rule, the Department is proposing a civil penalty that is calculated based on a firm's SNAP redemptions, thereby adjusting to the size and scope of the fraud, much as existing provisions do for civil money penalties, such as those associated with transfer of ownership.

The new proposed trafficking civil penalty is not related to a firm's future participation, but is designed to recoup the government provided funds diverted from their intended use. Thus, this rule would also clarify that, as the trafficking civil penalty and trafficking civil money penalty in lieu of permanent disqualification serve different purposes, they are not mutually exclusive and can both be assessed against a violating retailer. That is, if a firm is granted a trafficking civil money penalty in lieu of permanent disqualification, the firm would still be responsible for paying the trafficking civil penalties assessed pursuant to the violations that had

occurred. The proposed methodology for calculating the trafficking civil penalty is based on a retail food store's redemptions, ensuring that the penalty is reflective of a firm's size and sales volume. The proposed rule, therefore, ensures not only equitable treatment by assessing fines proportional to the violation, but also increases the deterrent effect against large scale fraud that may result in significant administrative penalties beyond existing criminal penalties.

Furthermore, this rule would provide that, if a firm was previously granted a trafficking civil money penalty in lieu of permanent disqualification, and again was found trafficking on a second occasion, the firm would no longer qualify for a trafficking civil money penalty in lieu of disqualification.

Sale of Common Ineligibles

Current regulations at 7 CFR 278.6 outline the penalties assessed against stores found violating the program rules, including those for the sale of common ineligibles. In today's environment, if the violations are too minor to warrant a sanction, FNS sends the store an official warning letter describing what FNS found during its investigation, thus providing the store an opportunity to take corrective action and come into compliance. However, if during an investigation FNS finds that non-trafficking violations are sufficiently extensive or pervasive as to suggest that it is the common practice of a firm, FNS assesses an administrative disqualification that can range from 6 months to 10 years, depending on the seriousness of the violations and whether the retailer has had previous violations. The longer disqualification time periods are reserved for either more egregious violations, such as the sale of alcohol or tobacco products for benefits, or if the firm had been previously sanctioned and has a history of program violations. If FNS establishes that it is common practice for a firm to sell common ineligibles for SNAP benefits, those firms are typically disqualified for six months for the first violation.

In providing greater flexibility for the Department to increase the penalties against trafficking violations, the Act also allows USDA to expand the progressive scale of penalties faced by firms whose violations are less severe. The sale of common ineligibles is the least egregious violation that is issued a sanction by FNS. Common ineligibles typically consist of paper products, cooking supplies, or household products. Research by FNS has indicated that many firms assessed a 6-month disqualification, due to the usual practice of selling common ineligibles, tend to close and/or undergo a change in ownership. This occurs because the firms are typically located in areas that have a higher concentration of SNAP recipients; therefore, even a limited 6-month suspension can result in the firm no longer being economically viable. Consequently, this rule proposes to apply disqualifications only to those repeat offenders or more severe violators; first time offenders that sell only common ineligibles would be assessed a newly established civil penalty and no longer be disqualified.

The proposed civil penalty is \$1,000 per violation and must be paid within 30 calendar days after FNS's final determination. This civil penalty is proposed as a flat fine, instead of being based on redemption volume, to reflect that the sale of common ineligibles for first time offenders is a minor violation, typically the result of negligence or oversight in training on the behalf of management, as opposed to more egregious violations, with the clear intent to defraud the government, that are based on redemption volume. The proposed civil penalty would allow retail food stores to pay the civil penalty, without enduring a disqualification, take corrective action, and re-evaluate their training methodology to ensure that there are no repeat offenses.

Civil Money Penalties: Hardship, Transfer of Ownership, Trafficking in Lieu of Permanent Disqualification

The current regulations reference parts of the Act that had imposed limits on the amount FNS could assess through a civil money penalty, applying caps that were based on individual violations and, in some cases, in a single overall investigation. The maximum limits currently used by FNS are \$11,000 per violation for hardship civil money penalties and transfer of ownership civil money penalties and \$32,000 per violation, with an overall limit of \$59,000 per investigation, for trafficking civil money penalties in lieu of permanent disqualification. In the Act, Congress removed the limitations for hardship civil money penalties and provided new language that allows the Secretary to issue a penalty of up to \$100,000 per violation. This rule revises the caps placed on calculations for hardship and transfer of ownership civil money penalties to bring the regulations in compliance with the Act. The cap for trafficking civil money penalty in lieu of permanent disqualification will remain unchanged.

In addition, the Act removed specific language referencing revised penalties assessed if the removal of a retail food store or wholesale food concern for non-trafficking violations would cause a hardship to SNAP recipients. Nevertheless, pursuant to the flexibility provided to the USDA by Section 12 of the Act, the USDA proposes to retain the qualification criteria for the hardship civil money penalty as it exists in current regulations. Today, upon request by the violating retailer and after FNS assesses whether a retailer qualifies, the hardship civil money penalty is assessed against retail food stores or wholesale food concerns that serve areas with limited food access or provide inventories that are not readily available in a given area, as their removal would cause a hardship to SNAP recipients. Typically, hardship civil money penalties are assessed against retail food stores and wholesale food concerns that sell common ineligibles. As this rule replaces the current 6-month disqualification with a new civil penalty for those situations, FNS estimates that, while hardship civil money penalties are not common today, they

will be even less common going forward. However, as some geographic areas continue to struggle with adequate food access, USDA will be keeping the hardship provision in the regulations to better address unforeseen circumstances that may arise.

Furthermore, when imposing a hardship civil money penalty, current regulations require a retailer to submit a collateral bond within 15 days to be eligible for reinstatement. The proposed rule would extend this time frame to allow retailers up to 30 days to submit a collateral bond. This change is necessary to respond to concerns from the retailer community indicating that it is becoming more difficult to find financial institutions offering these services at a competitive price within the time allotted. The additional time proposed in this rule would allow retailers more time to shop for these services.

Eliminating Fines for the Acceptance of Loose Coupons

This rule would eliminate provisions of part 278 that were enacted to address violations that occurred as a result of how retail food stores and wholesale food concerns accepted and redeemed paper coupons. Section 12(e)(3) of the Act continues to give the Secretary discretion to impose a fine against any retail food store or wholesale food concern that accepts food coupons not accompanied by the corresponding book cover; however, the 2008 Farm Bill de-obligated paper coupons, and such coupons are no longer issued, accepted, or redeemable. As a result, this rule proposes to eliminate a fine for accepting loose coupons at §278.6(l).

Fines for Transactions Conducted without the Presence of an EBT Card

Pursuant to Section 7(h)(2) of the Act, this rule proposes to would impose a fine for conducting a transaction without an EBT card being present. Current rules require that a card be

present at the time of transaction. This new fine would apply to those retailers that conduct transactions without having the card present.

To complete a transaction, a program recipient must present their EBT card, swipe the card through a POS device, and enter their personal identification number (PIN). The PIN identifies the individual as the one responsible for that card and authorizes the transaction. If a POS device is not working, the magnetic stripe of an EBT card is not reading, or if a business does not have ready access to a phone line, the EBT system offers alternative methods for completing the transaction. The typical alternative methods involve manual key entry of the EBT card number or the use of a manual voucher process, the latter of which is more common among delivery routes, farmers' markets, or traditional stores experiencing a system outage. However, the alternative methods do not change the requirement for the recipient and card to be present at the POS. Today, FNS receives complaints that program recipients who have benefits stolen by firms who conduct transactions without the EBT card being present or the knowledge and consent of the recipient. This may be enabled by households providing their card and PIN number to a retail food concern despite training by State Agencies not to ever divulge their PIN. Nevertheless, this is a violation of the regulations and this rule would allow FNS to assess penalties against firms that engage in this activity.

7 CFR Part 279 – Administrative and Judicial Review.

The Department is proposing to update this part to align the regulations with the Act by updating the FNS Administrative Review Branch mailing address and revising references to §278.6(e)(8), which is being moved as part of the changes., and removing some of the references

to coupon claims as the Act de-obligated coupons and prohibits them from being issued,accepted or redeemed.

List of Subjects in

7 CFR Part 278

Approval and participation of retail food stores and wholesale food concerns, participation of financial institutions, disqualification and imposition of civil penalties or fines for retail food stores and wholesale food concerns; and disposition of claims.

7 CFR Part 279

Administrative review, judicial review

For reason set forth in the preamble, 7 CFR parts 278 and 279 are proposed to be amended as follows:

1. The authority citation for 7 CFR parts 278 and 279 continues to read as follows:

Authority: 7 U.S.C. 2011-2036.

PART 278 – PARTICIPATION OF RETAIL FOOD STORES, WHOLESALE FOOD CONCERNS AND INSURED FINANCIAL INSTITUTIONS

2. In §278.1:

- a. Amend paragraph (b)(3)(vi) by removing the period and adding the phrase “, including the commission of intentional program violations while receiving benefits in the Supplemental Nutrition Assistance Program.” at the end.
- b. Revise paragraph (k)(7);
- c. Add paragraph (k)(8);
- d. Add paragraph (k)(9);
- e. Revise paragraph (l)(1)(v);
- f. Remove paragraph (1)(l)(vi) and redesignate paragraph (l)(1)(vii) as paragraph (l)(1)(vi);
- g. Add new paragraphs (l)(1)(vii) and (l)(1)(viii).

The revisions and additions read as follows:

§278.1 Approval of retail food stores and wholesale food concerns.

* * * * *

(k) * * *

(7) The firm has failed to pay any civil penalties assessed under §278.6(e)(1) or (e)(6); pay a transfer of ownership or hardship civil money penalty assessed under §278.6(g); pay any fines assessed under §278.6(m) or §278.6(l); or pay in full any fiscal claim assessed against the firm under §278.7.

(8) The firm has failed to adhere to the equal treatment provisions as specified in §278.2(b).

(9) The firm utilizes any access device that fails to comply with §274.8(b)(6) and (b)(7) or fails to provide unique terminal identification to the EBT system.

* * * * *

(l) * * *

(1) * * *

(v) The firm has failed to pay any civil penalties assessed under §278.6(e)(1) or (e)(6); pay a transfer of ownership or hardship civil money penalty assessed under §278.6(g); pay any fines assessed under §278.6(m) or §278.6(l); or pay in full any fiscal claim assessed against the firm under §278.7; or

(vi) The firm is required under State and/or local law to charge tax on eligible food purchased with benefits or to sequence or allocate purchases of eligible foods made with benefits and cash in a manner inconsistent with §272.1 of these regulations.

(vii) The firm has failed to adhere to the equal treatment provisions as specified in §278.2(b).

(viii) The firm utilizes any access device that fails to comply with §274.8(b)(6) and (7) or fails to provide unique terminal identification to the EBT system.

* * * * *

3. In §278.2, remove paragraphs (c) and (d) and redesignate paragraphs (e) through (l) as paragraphs (c) through (j), respectively.

4. Remove § 278.2(e)(2)

5. Remove and reserve §§278.3 and 278.4.

6. In §278.6:

a. Amend the section heading by adding the words “civil penalties” and removing the words “in lieu of disqualifications”;

b. Revise the heading of paragraph (a);

- c. Revise the first sentence of paragraph (a);
- d. Amend paragraph (b)(1) by removing the words “disqualification or imposition of a civil money penalty” wherever they appear and add in its place the words “disqualification or imposition of a civil penalty or civil money penalty” and by removing the words “The firm shall make its response, if any, to the officer in charge of the FNS field office which has responsibility for the project area in which the firm is located” in the seventh sentence and adding in its place the words “The firm shall make its response to FNS.”
- e. Revise the first sentence of paragraph (b)(2)(i);
- f. Revise the first and second sentences of paragraph (c);
- g. Amend paragraph (d) by removing the word “regional” in the first sentence;
- h. Revise paragraph (e)(1);
- i. Redesignate paragraph (e)(4)(ii) as paragraph (e)(4)(iii) and add a new paragraph (e)(4)(ii);
- j. Amend paragraph (e)(5) by removing the period adding the words “and FNS had previously advised the firm of the possibility that violations were occurring and of the possible consequences of violating regulations” at the end of the paragraph;
- k. Redesignate paragraph (e)(6) to (e)(8) as paragraphs (e)(7) to (e)(9) and add a new paragraph (e)(6);
- l. Revise paragraphs (g) and (h);
- m. Revise the introductory text of paragraph (i);
- n. Revise paragraphs (j) and (l);

The revisions and additions read as follows:

§278.6 Disqualification of retail food stores and wholesale food concerns, and imposition of civil penalties and civil money penalties.

(a) Authority to disqualify and subject to a civil penalty and civil money penalty. FNS may assess a civil penalty and civil money penalty against and disqualify any authorized retail food store or wholesale food concern from further participation. For the purposes of this part, civil money penalty refers to a civil penalty issued for hardship, transfer of ownership, or trafficking in lieu of disqualification.* * *

* * * * *

(b) * * *

(2) * * *

(i) The charge letter shall advise a firm being considered for permanent disqualification based on evidence of trafficking as defined in §271.2 that the firm must notify FNS if the firm desires FNS to consider the sanction of a trafficking civil money penalty in lieu of permanent disqualification and that if granted, the trafficking civil money penalty in lieu of permanent disqualification is in addition to any other civil penalties assessed under §278.6(e). * * *

* * * * *

(c) Review of evidence. The letter of charges, the response, and any other information available to FNS shall be reviewed and considered by the appropriate FNS office, which shall then issue the determination. In the case of a firm subject to permanent disqualification and civil penalty under paragraph (e)(1) of this section, the determination shall inform such a firm that action to permanently disqualify the firm shall be effective immediately upon the date of receipt of the notice of determination from FNS, regardless of whether a request for review is filed in accordance with part 279 of this chapter; however, any civil penalties shall be held in abeyance pending the outcome of administrative or judicial review. * * *

* * * * *

(e) Penalties. FNS shall take action as follows against any firm determined to have violated the Act or regulations. For the purposes of assigning a period of disqualification, a warning letter shall not be considered to be a sanction. A civil money penalty, a civil penalty, and a disqualification shall be considered sanctions for such purposes. FNS shall:

(1) Disqualify a firm permanently and assess a civil penalty in accordance with §278.6(g) if personnel of the firm have trafficked as defined in §271.2; or only disqualify a firm permanently if:

(i) Violations such as, but not limited to, the sale of ineligible items occurred and the firm had twice before been sanctioned.

(ii) It is determined that personnel of the firm knowingly submitted information on the application that contains false information of a substantive nature that could affect the eligibility of the firm for authorization in the program, such as, but not limited to, information related to:

(A) Eligibility requirements under §278.1(b), (c), (d), (e), (f), (g) and (h);

(B) Staple food stock;

(C) Annual gross sales for firms seeking to qualify for authorization under Criterion B as specified in the Food Stamp Act of 1977, as amended;

(D) Annual staple food sales;

(E) Total annual gross retail food sales for firms seeking authorization as co-located wholesale/retail firms;

(F) Ownership of the firm;

(G) Employer Identification Numbers and Social Security Numbers;

(H) Food Stamp Program history, business practices, business ethics, WIC disqualification or authorization status, when the store did (or will) open for business under the current ownership,

business, health or other licenses, and whether or not the firm is a retail and wholesale firm operating at the same location; or

(I) Any other information of a substantive nature that could affect the eligibility of a firm. * *

* * *

(4)* * *

(ii) It is to be the second sanction for the firm and evidence shows that personnel of the firm have committed violations, such as the sale of common nonfood items in amounts normally found in a shopping basket; or

* * * * *

(6) Impose a civil penalty if it is to be the first sanction for the firm and evidence shows that personnel of the firm have committed violations such as but not limited to the sale of common nonfood items due to carelessness or poor supervision by the firm's ownership or management and FNS had not previously advised the firm of the possibility that violations were occurring and of the possible consequences of violating regulations. The civil penalty shall be \$1,000 for each violation and must be paid in full within 30 days of the individual's or legal entity's receipt of FNS' notification to pay the penalty. FNS may withdraw the authorization of any firm that has failed to pay the civil penalty in full within 30 days, as specified under §278.1(l).

* * * * *

(g) Amount of trafficking civil penalties and civil money penalties for hardship and transfer of ownership. FNS shall determine the amount of the trafficking civil penalty and hardship and transfer of ownership civil money penalty as follows:

(1) Determine the firm's average monthly redemptions of benefits for the 12-month period ending with the month immediately preceding the month during which the firm was charged with violations.

(2) Multiply the average monthly redemption figure by 10 percent.

(3) Multiply the product by arrived at in paragraph (g)(2) by the number of months for which the firm would have been disqualified under paragraph (e) of this section. Firms disqualified permanently for trafficking shall multiply the product arrived at in paragraph (g)(2) by 120 when determining the amount of a trafficking civil penalty. Firms disqualified permanently for trafficking shall multiply the product arrived at in paragraph (g)(2) by 240, to reflect double the penalty for a ten year disqualification, when determining a transfer of ownership civil money penalty in accordance with §278.6(f). The penalty may not exceed an amount specified in §3.91(b)(3)(i) of this title for each violation.

(h) Notifying the firm of trafficking civil penalties and civil money penalties for hardship and transfer of ownership. A firm has 15 days from the date that FNS notifies the firm in writing in which to pay the penalty, or to notify FNS in writing of its intent to pay in installments as specified by the Agency. For hardship civil money penalties, FNS shall:

(1) Require the firm to present to FNS a collateral bond as specified in §278.1(b)(4), within 30 days, and the civil money penalty must be paid in full by the end of the period for which the firm would have been disqualified;

(2) Disqualify the firm for the period determined to be appropriate under paragraph (e) of this section if the firm refuses to pay any of the civil money penalty;

(3) Disqualify the firm for a period corresponding to the unpaid part of the civil money penalty if the firm does not pay the civil money penalty in full or in installments as specified by FNS; or

(4) Disqualify the firm for the prescribed period if the firm does not present a collateral bond or irrevocable letter of credit within the required 30 days. Any payment on the hardship civil money penalty which has been received by FNS shall be returned to the firm. If the firm presents the required bond or irrevocable letter of credit during the disqualification period, the civil money penalty may be reinstated for the duration of the disqualification period.

(i) Criteria for eligibility for a civil money penalty in lieu of permanent disqualification for trafficking. FNS may impose a civil money penalty in lieu of a permanent disqualification for trafficking as defined in §271.2 if the firm timely submits to FNS substantial evidence which demonstrates that the firm had established and implemented an effective compliance policy and program to prevent violations of the Program. A civil money penalty is in lieu of the permanent disqualification does not replace, but is in addition to, the trafficking civil penalty described in §278.6(e)(1). Firms assessed a civil money penalty under this paragraph shall be subject to the applicable penalties included in §278.6(e)(2) through (e)(7) for the sale of ineligible items. In determining the minimum standards of eligibility of a firm for a civil money penalty in lieu of a permanent disqualification for trafficking, the firm shall, at a minimum, establish by substantial evidence its fulfillment of each of the following criteria:

Criterion 1. The firm shall have developed an effective compliance policy as specified in §278.6(i)(1); and

Criterion 2. The firm had developed and instituted an effective personnel training program as specified in §278.6(i)(2) and that both its compliance policy and program were in operation at the location where the violation(s) occurred prior to the occurrence of violations cited in the charge letter sent to the firm; and

Criterion 3. The firm's ownership was not aware of, did not approve, did not benefit from, or was not in any way involved in the conduct or approval of the trafficking violations; and

Criterion 4. It is the first occasion of any trafficking violations at the firm, regardless of whether the firm's management was aware of, approved of, benefited from, or was in any way involved in the conduct or approval of the trafficking violations. Upon the second occasion of trafficking, regardless of whether the violations were committed by firm management or employees, a firm shall not be eligible for a civil money penalty in lieu of permanent disqualification.

Notwithstanding the above provision, if trafficking violations consisted of the sale of firearms, ammunition, explosives, or controlled substances, as defined in 21 U.S.C. §802, and such trafficking was conducted by ownership or management of the firm, the firm shall not be eligible for a civil money penalty in lieu of permanent disqualification. For purposes of this section, a person is considered to be part of firm management if that individual has substantial supervisory responsibilities with regard to directing the activities and work assignments of store employees. Such supervisory responsibilities shall include the authority to hire employees for the store or to terminate the employment of individuals working for the store.

* * * * *

(j) Amount of civil money penalty in lieu of permanent disqualification for trafficking. A civil money penalty assessed in accordance with §278.6(i) shall not exceed the amount specified in §3.91(b)(3)(ii) of this title for each violation and shall not exceed the amount specified in §3.91(b)(3)(ii) of this title for all violations occurring during a single investigation. FNS shall determine the amount of the civil money penalty as follows:

(1) Determine the firm's average monthly redemptions for the 12-month period ending with the month immediately preceding the month during which the firm was charged with violations;

- (2) Multiply the average monthly redemption figure by 10 percent;
- (3) Multiply the product by 120, in accordance with §278.6(f), to reflect double the penalty for a ten year disqualification;
- (4) If a second trafficking offense is committed by the firm, the firm shall not be eligible for a civil money penalty in lieu of permanent disqualification.

* * * * *

(l) Fines for acceptance of benefits without an EBT Card being present. FNS may impose a fine against any retail food store or wholesale food concern that accepts benefits that are not accompanied by an EBT card being present and with the intent of conducting a transaction without a recipient's knowledge or consent. The fine to be assessed against a firm found to be accepting benefits without an EBT card being present shall be \$1,000 per investigation plus an amount equal to double the value of each transaction that occurred without an EBT card being present, and may be assessed in addition to any fiscal claim or civil penalty established by FNS under §278.6(e)(1) through (e)(6), §278.6(g), or §278.6(j). The fine shall be paid in full within 30 days of receipt of FNS' notification to pay the fine. The Attorney General of the United States may institute judicial action in any court of competent jurisdiction against the store or concern to collect the fine. FNS may withdraw the authorization of the store, as well as other authorized locations of a multi-unit firm which are under the same ownership, for failure to pay such a fine as specified under §278.6(l).

7. In §278.7, remove paragraphs (d) through (g);

8. Remove §278.8 and redesignate §278.9 as §278.8;

9. In the newly redesignated §278.8, remove paragraph (a) and redesignate paragraphs (b) through (m) as (a) through (l), respectively;

10. Remove §278.10.

PART 279 – ADMINISTRATIVE AND JUDICIAL REVIEW – FOOD RETAILERS AND FOOD WHOLESALERS

11. In §279.1:

a. Paragraph (a)(2), remove the reference to “§278.6(e)(8)” and add in its place the reference “§278.6(e)(9)”;

b. Revise paragraph (a)(4) to read as follows:

§279.1 Jurisdiction and authority.

* * * * *

(a) * * *

(4) Denial of all or part of any claim asserted by a firm against FNS under §278.7(c) of this chapter;

* * * * *

12. In §279.2, revise paragraph (a) to read as follows:

§279.2 Manner of filing requests for review.

(a) Submitting requests for review. Requests for review submitted by firms shall be mailed to or filed with the Branch Chief, Administrative Review Branch, U.S. Department of Agriculture, Food and Nutrition Service, 3101 Park Center Drive, Alexandria, Virginia 22302.

* * * * *

13. In §279.6, revise paragraph (a) to read as follows:

§279.6 Legal advice and extensions of time.

(a) Advice from the Office of the General Counsel. If any request for review involves any doubtful questions of law, FNS shall obtain the advice of the Department's Office of the General Counsel.

* * * * *

14. In §279.7, remove the reference to “§278.6(e)(8)” and add in its place the reference “§278.6(e)(9)”

/signed/

Kevin W. Concannon
Under Secretary
Food, Nutrition, and Consumer Services

Date

Supplemental Nutrition Assistance Program (SNAP)
Proposed Retailer Sanctions
Summary
August 9, 2012

USDA proposes to implement greater flexibility to assess sanctions and fiscal penalties against SNAP retailers who violate program rules. The proposal allows USDA to use its full authority to deter fraudulent SNAP activity and to ensure that those who violate program rules face stiff penalties.

The proposal will:

- Assess a fiscal penalty in addition to permanently removing any retailer found guilty of trafficking, the most serious of SNAP violations. The penalty amount would be based on the amount of SNAP business the retailer conducts so that the penalty is reflective of a store's size and sales volume. This change would allow the Department to financially impact trafficking retailers in a way currently not possible.
- Remove SNAP retailers from the program who fail to pay the new civil penalties included in the rule; fail to comply with the EBT regulations; were previously disqualified as a SNAP recipient; or who violate the equal treatment provision, such as instituting a minimum purchase requirement for SNAP customers, but not for cash, credit, or debit card customers.
- Assess a \$1,000 fine for selling common ineligible items, such as paper products, to first-time offenders. Currently, a fine is not an option. Instead, first-time violators of selling common, ineligible items are disqualified for 6 months. Repeat violators would continue to be subject to disqualification.
- Assess a fine on retailers who conduct SNAP transactions without the card present.
- Increase all monetary damages by standardizing the methodology used to calculate the damages and by replacing the current caps with the new higher statutory limit of \$100,000 per violation, with no limit on damages for each investigation. Currently hardship and transfer of ownership civil money penalties are capped at \$11,000 per violation, and trafficking civil money penalties are currently capped at \$32,000 per violation and \$59,000 per investigation.
- Make retailers found guilty of trafficking a second time no longer eligible to pay a fine instead of being disqualified. This provision is available to a narrow group of retailers—where a rogue employee was responsible for the offense. The new fiscal penalty allows an innocent store owner to pay a fine for a first offense and remain in the program instead of being permanently disqualified due to the actions of a rogue employee. However, after the second offense, the store would be permanently disqualified.

**Supplemental Nutrition Assistance Program (SNAP)
Proposed Retailer Sanctions
Summary
August 9, 2012**

Exhibit 1: Comparison of Current and Proposed Sanctions

	Today	Proposed
Trafficking	Permanent Disqualification	<p>Permanent Disqualification and Civil Penalty defined as follows:</p> <ul style="list-style-type: none"> Firm's Average Monthly SNAP redemptions (AMR) for previous 12 months Multiply AMR by 10% Multiply the end product by 120 Months.
Trafficking Civil Money Penalty*** in Lieu of Permanent Disqualification	<p>Civil Money Penalty is determined as follows:</p> <ul style="list-style-type: none"> Firm's Average Monthly SNAP redemptions (AMR) for previous 12 months Multiply AMR by 10% Multiply the end product by 60 if 1st offense or by 120 if 2nd offense If 3rd offense, store is ineligible. Fine is capped at \$32,000 per violation or \$59,000 per investigation. 	<p>Civil Money Penalty is determined as follows:</p> <ul style="list-style-type: none"> Firm's Average Monthly SNAP redemptions (AMR) for previous 12 months Multiply AMR by 10% Multiply the end product by 120 Months If 2nd offense, store is ineligible. Fine is capped at \$100,000 per violation. No investigation cap. CMP is in addition to the civil penalty described above.
Transfer of Ownership Civil Money Penalty* or Hardship Civil Money Penalty**	<p>CMP is determined as follows:</p> <ul style="list-style-type: none"> Firm's Average Monthly SNAP redemptions (AMR) for previous 12 months Multiply AMR by 10% Multiply the end product by the number of months for which the firm would have been disqualified. In the case of trafficking, use 240. Fine is capped at \$11,000 per violation 	<p>CMP is determined as follows:</p> <ul style="list-style-type: none"> Firm's Average Monthly SNAP redemptions (AMR) for previous 12 months Multiply AMR by 10% Multiply the end product by the number of months for which the firm would have been disqualified. In the case of trafficking, use 240. Fine is capped at \$100,000 per violation

**Supplemental Nutrition Assistance Program (SNAP)
Proposed Retailer Sanctions
Summary
August 9, 2012**

Exhibit 2: Example of Changes in the Penalty for Trafficking

Store #1:

- Permanently disqualified on July 8, 2011.
- Identified by FNS through our fraud detection system.
- Charged with one trafficking violation on the basis of an electronic transaction data pattern.
- Averaged \$5,467 a month in SNAP redemptions resulting in an annual total of \$65,604.

Penalty:

	Today	Proposed
Trafficking	Permanent Disqualification	Permanent Disqualification and \$65,604 Civil Penalty
Transfer of Ownership CMP*	And \$11,000 if store is sold	And \$131,208 - capped at \$100,000 for the single violation - if store is sold

OR

Trafficking CMP (for those owners who are eligible)	\$32,802	\$65,604, plus the \$65,604 civil penalty (i.e. \$ 131,208)
Transfer of Ownership CMP*	And \$11,000 if store is sold	And \$131,208 - capped at \$100,000 for the single violation - if store is sold

**Supplemental Nutrition Assistance Program (SNAP)
Proposed Retailer Sanctions
Summary
August 9, 2012**

Exhibit 3: Estimated Annual Impact of this Proposal (Based on FNS Actions in FY2011)

	Today	Proposed
Trafficking	<ul style="list-style-type: none"> 1,215 stores permanently disqualified 	<ul style="list-style-type: none"> 1,215 stores permanently disqualified and \$174,099,565 civil penalties would be assessed <ul style="list-style-type: none"> Average penalty would be \$143,765
Trafficking CMP in Lieu of Permanent Disqualification	<ul style="list-style-type: none"> 4 Trafficking CMP's assessed at \$111,440 	<ul style="list-style-type: none"> 4 Trafficking CMP's would be assessed at \$367,674
Transfer of Ownership Civil Money Penalty*	<ul style="list-style-type: none"> 157 Transfer of Ownership CMP's assessed at \$5,614,795 <ul style="list-style-type: none"> Average fine is \$35,763 15% were capped at \$11,000 per violation 	<ul style="list-style-type: none"> 157 Transfer of Ownership CMP's would be assessed at \$41,387,398 <ul style="list-style-type: none"> Average fine would be \$263,614 55% would be capped at \$100,000 per violation

***Reason for Transfer of Ownership Civil Money Penalty-** If the disqualified retailer has transferred ownership or sold their retail food store/wholesale food concern they will be subjected to and liable for this civil money penalty.

****Reason for Hardship Civil Money Penalty-** If the retailers' disqualification is for a violation other than trafficking and would cause hardship to SNAP beneficiaries because there is no other authorized retailer in the area selling as large a variety of items at comparable prices to the one being disqualified, FNS may impose a civil money penalty as a sanction in lieu of disqualification.

*****Reason for Trafficking Civil Money Penalty –** In some limited circumstances as defined by regulation, retailers are eligible for a monetary penalty in lieu of a permanent disqualification.